

San Francisco Law Library

436 CITY HALL


No. ~~4~~ 144062

EXTRACT FROM RULES

Rule 1a. Books and other legal material may be borrowed from the San Francisco Law Library for use within the City and County of San Francisco, for the periods of time and on the conditions hereinafter provided, by the judges of all courts situated within the City and County, by Municipal, State and Federal officers, and any member of the State Bar in good standing and practicing law in the City and County of San Francisco. Each book or other item so borrowed shall be returned within five days or such shorter period as the Librarian shall require for books of special character, including books constantly in use, or of unusual value. The Librarian may, in his discretion, grant such renewals and extensions of time for the return of books as he may deem proper under the particular circumstances and to the best interests of the Library and its patrons. Books shall not be borrowed or withdrawn from the Library by the general public or by law students except in unusual cases of extenuating circumstances and within the discretion of the Librarian.

Rule 2a. No book or other item shall be removed or withdrawn from the Library by anyone for any purpose without first giving written receipt in such form as shall be prescribed and furnished for the purpose, failure of which shall be ground for suspension or denial of the privilege of the Library.

Rule 5a. No book or other material in the Library shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured, and any person violating this provision shall be liable for a sum not exceeding treble the cost of replacement of the book or other material so treated and may be denied the further privilege of the Library.



Digitized by the Internet Archive
in 2011 with funding from
Public.Resource.Org and Law.Gov

2571

No. 12165

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SOUTH SIDE THEATRES, INC., and MARCO WOLFF, FANCHON SIMON, ROY N. WOLFF and RUBE WOLFF, Joint Venturers, Doing Business Under the Name of SOUTH SIDE ASSOCIATES,

Appellants,

vs.

UNITED WEST COAST THEATRES CORPORATION, TWENTIETH CENTURY FOX FILM CORPORATION, CHARLES P. SKOURAS, SPYROS P. SKOURAS, FOX WEST COAST AGENCY CORPORATION, FRANK MILLAN, Receiver, etc., LOEWS, INC., RKO-RADIO PICTURES, INC., COLUMBIA PICTURES CORP., WARNER BROS. PICTURES, INC., and PARAMOUNT PICTURES, INC.,

Appellees.

TRANSCRIPT OF RECORD

Appeals from the United States District Court for the
Southern District of California
Central Division

MAR 24 1949

PAUL P. O'BRIEN,



No. 12165

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SOUTH SIDE THEATRES, INC., and MARCO
WOLFF, FANCHON SIMON, ROY N. WOLFF
and RUBE WOLFF, Joint Venturers, Doing Busi-
ness Under the Name of SOUTH SIDE AS-
SOCIATES,

Appellants,

vs.

UNITED WEST COAST THEATRES CORPORA-
TION, TWENTIETH CENTURY FOX FILM
CORPORATION, CHARLES P. SKOURAS,
SPYROS P. SKOURAS, FOX WEST COAST
AGENCY CORPORATION, FRANK MILLAN,
Receiver, etc., LOEWS, INC., RKO-RADIO PIC-
TURES, INC., COLUMBIA PICTURES CORP.,
WARNER BROS. PICTURES, INC., and PARA-
MOUNT PICTURES, INC.,

Appellees.

TRANSCRIPT OF RECORD

Appeals from the United States District Court for the
Southern District of California
Central Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

	Page
Appeal:	
Notice of	92
Points and Designations of Transcript on, (Court of Appeals)	130
Certificate of Clerk.....	93
Complaint for Declaratory Relief.....	2
Exhibit A. Agreement, Dated April 1, 1941, Between United West Coast Theatres Corporation, Fox West Coast Agency Corporation and South Side Theatres, Inc.....	10
Exhibit B. Notice to Terminate Venture Agreement, Dated June 9, 1947.....	12
Exhibit C. Notice to Terminate Venture Agreement, Dated June 27, 1947.....	16
Motion to Dismiss and to Summon United States of America as a Party, Notice of.....	49
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	92
Objections to Motion, of Receiver, Frank Millan.....	67
Objections to Receiver's Final Report.....	82
Order Allowing Temporary Receiver Interim Compensation	48

	Page
Order Approving Receiver's Final Account, etc.....	90
Order to Show Cause, Filed June 3, 1948.....	47
Order to Show Cause and Appointment of Temporary Receiver	17
Points and Designations of Transcript Under Rule 19, Subdivision 6 (Court of Appeals).....	130
Receiver's Final Report.....	76
Receiver's Report, Filed August 20, 1948.....	69
Reply to Objections to Receiver's Final Report.....	86
Reporter's Transcript of Proceedings, Dated July 7, 1947	95
Reporter's Transcript of Proceedings, Dated Septem- ber 10, 1947.....	99
Reporter's Transcript of Proceedings, Dated January 26, 1948	125
Return on Order to Show Cause.....	20
Exhibit 1. Copy of Petition, Filed July 20, 1938, in Civil Action No. 87-273.....	24
Exhibit 2. Copy of Amended and Supplemental Complaint, Filed November 14, 1940, in Civil Action No. 87-273.....	31
Exhibit 6. Copy of the Decree, Filed December 31, 1946, in Civil Action No. 87-273.....	36
Wage Agreement Approval.....	51

NAMES AND ADDRESSES OF ATTORNEYS:

For Appellants:

MACFARLANE, SCHAEFER & HAUN
1150 Subway Terminal Building
Los Angeles 13, Calif.

For Appellees United West Coast et al.:

NEWLIN, HOLLEY, SANDMEYER &
COLEMAN
601 West Fifth Street
Los Angeles 13, Calif.

For Appellee Loews, Inc.:

LOEB & LOEB
523 West Sixth Street
Los Angeles 14, Calif.

For Appellees RKO-Radio Pictures et al.:

MITCHELL, SILBERBERG & KNUPP
727 West Seventh Street
Los Angeles 14, Calif.

For Appellee Warner Bros. Pictures:

FRESTON & FILES
650 South Spring Street
Los Angeles 14, Calif.

For Appellee Paramount Pictures:

O'MELVENY & MYERS
433 South Spring Street
Los Angeles 13, Calif.

For Appellee Receiver, Frank Millan:

O'CONNOR & O'CONNOR
530 West Sixth Street
Los Angeles 14, Calif. [1*]

In the District Court of the United States for the
Southern District of California
Central Division

Civil Action No. 7282-BH

UNITED WEST COAST THEATRES CORPORA-
TION and FOX WEST COAST AGENCY COR-
PORATION,

Plaintiffs,

vs.

SOUTH SIDE THEATRES, INC. and MARCO
WOLFF, FANCHON SIMON, ROY N. WOLFF
and RUBE WOLFF, Joint Venturers, Doing Busi-
ness Under the Name of SOUTH SIDE AS-
SOCIATES,

Defendants.

COMPLAINT FOR DECLARATORY RELIEF

Plaintiffs above named complain of the above named
defendants as follows:

I.

The matter in controversy exceeds, exclusive of inter-
est and costs, the sum or value of three thousand dollars
(\$3,000.00), and arises under the laws of the United
States, to-wit: Section 1 of the Act of Congress of July
2, 1890, 15 U. S. C. A. sec. 4, entitled "An act to protect
trade and commerce against unlawful restraints and mon-
opolies," commonly known as the Sherman Act.

II.

At all times herein mentioned, plaintiff, United West
Coast Theatres Corporation, has been and is now a Cali-
fornia [2] corporation with its principal place of busi-
ness in the County of Los Angeles, State of California,

and plaintiff, Fox West Coast Agency Corporation, has been and now is a Delaware corporation doing business in the County of Los Angeles, State of California.

III.

At all times herein mentioned, defendant, South Side Theatres, Inc. has been and now is a California corporation with its principal place of business in the County of Los Angeles, State of California, and defendant, South Side Associates has been and is a joint venture by and between Marco Wolff, Fanchon Simon, Roy N. Wolff and Rube Wolff, each of whom are residents of the County of Los Angeles, State of California.

IV.

Plaintiff, United West Coast Theatres Corporation, at all times mentioned herein has been and now is the lessee of the premises known as the Fifth Avenue Theatre Building in which is located the "Fifth Avenue Theatre" at 2541 West Manchester Boulevard, Inglewood, California.

V.

Defendant, South Side Theatres, Inc. at all times mentioned herein has been and now is the owner of the premises known as the Alto Theatre Building in which is located the "Alto Theatre" at 8862 South Western Avenue, Los Angeles, California.

VI.

On or about April 1, 1941, plaintiffs entered into a written agreement with defendant, South Side Theatres, Inc., pursuant to which the Fifth Avenue and Alto theatres and the buildings in which said theatres respectively are located, were to be operated by plaintiffs and said defendant as a joint venture to be known and designated as the "Fifth Avenue and Alto Theatres Venture" for a term

of ten (10) years beginning April 1, 1941 and ending March 31, 1951 and pursuant to which agreement, plaintiff, United West [3] Coast Theatres Corporation, became entitled to fifty-one per cent (51%) of the proceeds of said joint venture and became liable for fifty-one per cent (51%) of the losses of said joint venture and the defendant, South Side Theatres, Inc., became entitled to forty-nine per cent (49%) of the profits of said joint venture and liable for forty-nine per cent (49%) of the losses of said joint venture. Said agreement, made on or about April 1, 1941, also provided for the employment of plaintiff, Fox West Coast Agency Corporation, to generally supervise the business of the venture for which services Fox West Coast Agency Corporation was to receive weekly compensation equal to five and one-fourth per cent ($5\frac{1}{4}\%$) of the weekly gross receipts of the venture (exclusive of admission taxes or other like taxes on admissions).

VII.

On or about April 1, 1941 plaintiffs and defendant, South Side Theatres, Inc., entered into a written agreement providing for the termination of the "Fifth Avenue and Alto Theatres Venture" upon the happening of certain events. A true and correct copy of said agreement is attached hereto, made a part hereof, and marked Exhibit A. Among the events set forth in said agreement, the happening of which would give any part to said agreement the right to terminate, was and is the entry of a Decree in an action brought by the United States of America against any party or parties to said agreement requiring and directing such party or parties to terminate or nullify said venture agreement or the effect of which would be to subject any of the parties thereto to any penalty or damage on account thereof or anything done thereunder. For con-

venience the agreement pursuant to which the venture was created will hereinafter be referred to as "the venture agreement" and the agreement pursuant to which the venture may be terminated will hereinafter be referred to as "the termination agreement." [4]

VIII.

On or about March 1, 1944, defendant, South Side Theatres, Inc. sold, transferred, conveyed and assigned to defendant, South Side Associates all of its right, title and interest in, to and under the venture agreement, reserving, however, to said South Side Theatres, Inc. all of its then interest in the real property comprising the Alto Theatre Building.

IX.

On June 11, 1946 a Special Expediting Court convened under the authority of the Expediting Act of February 11, 1903 (15 U. S. C. A. sec. 29), sitting as the United States District Court for the Southern District of New York in the matter of United States of America, plaintiff, against Paramount Pictures, Inc., et al., defendants, Equity Number 87-273, filed an Opinion in which the court indicated that certain agreements between owners of two or more theatres normally in competition were illegal and the court further stated that "Even if the parties to such combinations were not major film producers and distributors, but were wholly independent exhibitors, such agreements might often be regarded as beyond the reasonable limits of restraint allowance under the Sherman Act." On December 31, 1946 said court filed its Findings of Fact, including, among other findings, Number 113, as follows: "Other forms of operating agreements are between major defendants and independent exhibitors rather than between major defendants. The ef-

fect is to ally two or more theatres of different ownership into a coalition for the nullification of competition between them and for their more effective competition against theatres not members of the 'pool'." On the same date, December 31, 1946, said court entered a Decree enjoining and restraining certain of the defendants in said action, including Twentieth Century-Fox Film Corporation and National Theatres Corporation (sometimes erroneously referred to in said Decree as "National Theatres, Inc."). [5] "From making or continuing to perform pooling agreements whereby given theatres of two or more exhibitors normally in competition are operated as a unit or whereby the business policies of such exhibitors are collectively determined by a joint committee or by one of the exhibitors or whereby profits of the 'pooled' theatres are divided among the owners according to prearranged percentages." The above quoted provisions of said Decree became effective July 1, 1947.

X.

The plaintiffs herein are subsidiaries of Twentieth Century-Fox Film Corporation and National Theatres Corporation, two of the defendants so enjoined and restrained. Plaintiffs are informed and believe and, therefore, allege that said venture agreement is an agreement, the performance of which is enjoined and restrained by said Decree from and after June 30, 1947. Plaintiffs fear that if they continue, through said venture or otherwise, to operate said Alto Theatre after June 30, 1947, they will violate the terms of the Decree referred to earlier in this paragraph and will be in contempt of the court making said Decree and will be subjected to penalties therefor.

XI.

The venture agreement is a written contract in which plaintiffs are interested and with reference to which plaintiffs desire a declaration with respect to the rights or liabilities of plaintiffs and defendants.

XII.

An actual controversy relating to the legal rights and liabilities of plaintiffs and defendants exists and arises out of the following facts:

On or about June 10, 1947, plaintiffs served upon defendants a notice of their intention to terminate the venture agreement by reason of the happening of [6] certain of the events specified in the termination agreement and the provisions of the Decree in the matter of United States vs. Paramount Pictures, Inc., et al. A true and correct copy of said notice is attached hereto, and made part hereof and marked Exhibit B.

On or about June 30, 1947, plaintiffs served upon defendants a notice terminating said venture agreement, a true and correct copy of which is attached hereto, made part hereof and marked Exhibit C. Plaintiffs contend that by reason of the provisions of the termination agreement and by reason of the provisions of the Decree in United States vs. Paramount Pictures, Inc., et al., plaintiffs are no longer obliged to and are no longer legally permitted to perform the venture agreement and that performance of the venture agreement has been rendered impossible and terminated by operation of law.

Defendants contend that regardless of said Decree plaintiffs are still bound by said venture agreement and required to perform the same in accordance with its terms.

XIII.

Defendant, South Side Theatres, Inc., is the owner of the Alto Theatre Building and the Alto Theatre located therein, referred to in paragraph V hereinabove and for some time last past said "Fifth Avenue and Alto Theatre Venture" has been operating said theatre. On June 30, 1947 plaintiffs tendered the possession of said theatre to defendants and requested them to operate the same. Defendants refuse to accept possession of said theatre and refuse to operate the same. Said theatre is now closed and will remain dark from and after June 30, 1947. Said theatre operation has been very profitable, the average weekly profits therefrom having been approximately five hundred dollars (\$500.00). In the event [7] that said theatre premises be not operated and said theatre remain dark, not only will the anticipated profits from said operation have been lost but future profits will be impaired by reason of the adverse effect upon the community which patronizes said theatre and irreparable damage to the operations of said theatre will result. The "Fifth Avenue and Alto Theatres Venture," 1609 West Washington Boulevard, Los Angeles, California (telephone Republic 4111), although having tendered possession to South Side Theatres, Inc. and South Side Associates of the real and personal property comprising the Alto Theatre Building, including the Alto Theatre located therein, for which a receiver is herein requested, is now in actual possession of the same. The parties entitled to possession of said real and personal property are South Side Theatres, Inc. and South Side Associates, 6838

Hollywood Boulevard, Hollywood, California (telephone Hempstead 3263).

Wherefore, plaintiffs pray judgment as follows:

1. That the venture agreement be declared to be terminated and is of no further force or effect.

2. That it be decreed that plaintiffs are no longer bound to perform the venture agreement or any part thereof.

3. That the court declare such other rights or duties as may be necessary or proper with relation to said agreement between plaintiffs and defendants.

4. That a receiver be appointed upon the filing of this complaint and permanently thereafter to take charge of said Alto Theatre Building, including the Alto Theatre located therein, and to operate the theatre business conducted in said theatre.

5. That an order to show cause be issued herein requiring the defendants to appear before this court upon a day fixed by said court, then and there to show cause why the appointment of a receiver herein should not be made permanent. [8]

6. That the court give such further relief, equitable or otherwise, as the court deems proper and necessary in the premises.

7. For plaintiffs costs herein incurred.

LOEB AND LOEB

By Benjamin F. Schwartz

Attorneys for Plaintiffs [9]

[Verified.] [10]

EXHIBIT "A"

The parties hereto, United West Coast Theatres Corporation, Fox West Coast Agency Corporation and South Side Theatres, Inc. are simultaneously herewith entering into an agreement relating to the joint operation of the Fifth Avenue and Alto Theatres in Inglewood and Los Angeles respectively. United West Coast Theatres Corporation and Fox West Coast Agency Corporation are subsidiaries of Fox West Coast Theatres Corporation and their activities are scrutinized by the Government of the United States. None of the parties hereto believe that the entering into of said agreement or the carrying out thereof, in accordance with its terms, would in any wise violate any law or regulation of the United States or any other governmental body but on the contrary they and each of them believe that said agreement and the carrying out thereof is perfectly lawful. Nevertheless, if said agreement or anything done thereunder shall at any time be objected to in writing by the Government of the United States, acting through the Attorney General of the United States or the Assistant Attorney General in charge of the enforcement of laws directed against monopolies, as in contravention of the laws of the United States against monopolies or any consent or other decree entered in an action brought by the United States, or if proceedings be brought by said Government or by the Government of the State of California pursuant to the "Cartwright Act" or similar legislation, to terminate or nullify said agreement or subject any of the parties hereto to any penalty or damage on account thereof or any-

thing done thereunder, or if United West Coast Theatres Corporation or Fox West Coast Theatres Corporation, or an subsidiary thereof, be directed, in writing, by the Government of the United States, acting through the Attorney General of the United States or the Assistant Attorney General in charge of the enforcement of laws directed against monopolies, to divest itself of its interest in said Fifth Avenue Theatre, or an action be brought by the Government of the United States in which divestment is asked for, then the parties hereto [11] agree that they will forthwith, at the election of any one of them, terminate said agreement. Upon such termination each of the parties hereto shall automatically be released from its obligations thereunder thereafter to accrue.

Dated: April 1st, 1941.

UNITED WEST COAST THEATRES
CORPORATION

By /s/ Charles A. Buckley
Vice President

By /s/ Albert W. Leeds
Secretary

FOX WEST COAST AGENCY CORPORATION

By /s/ Charles A. Buckley
Vice President

By /s/ John B. Bertero
Asst. Secretary

SOUTH SIDE THEATRES, INC.

By /s/ L. R. Lautterstein
Vice President

By /s/ R. B. Grunauer
Treasurer [12]

EXHIBIT "B"

June 9, 1947

South Side Theatres, Inc.
6838 Hollywood Boulevard
Hollywood 28, California

Gentlemen:

We enclose a notice dated June 10, 1947, notifying you and South Side Associates that we elect to terminate the venture arrangements covering the operations of the Fifth Avenue Theatre premises, Inglewood, California, and the Alto Theatre premises, Los Angeles, California.

As you are aware, the Decree in *United States vs. Paramount Pictures, Inc., et al.*, Equity No. 87-273, in the District Court of the United States for the Southern District of New York prohibits the performance after June 30 next of certain pooling agreements. We suggest that for convenience in accounting the operating arrangements between the Fifth Avenue and Alto terminate at the close of business on June 24 next, but if you desire the arrangements to continue to June 30, 1947 or to terminate on a date earlier than June 30, 1947, please advise us and we shall accept whatever date you desire. If you do not advise us that you desire a termination date earlier than June 30, 1947, we shall consider that the termination shall be June 30, 1947.

Very truly yours,

UNITED WEST COAST THEATRES
CORPORATION

By JOHN B. BERTERO

Vice President

FOX WEST COAST AGENCY CORPORATION

By JOHN B. BERTERO

Vice President

JBB:DH

Enc.

reg. mail/rr [13]

June 9, 1947

South Side Associates
6838 Hollywood Boulevard
Hollywood 28, California

Gentlemen:

We enclose a notice dated June 10, 1947, notifying you and South Side Theatres, Inc. that we elect to terminate the venture arrangements covering the operations of the Fifth Avenue Theatre premises, Inglewood, California, and the Alto Theatre premises, Los Angeles, California.

As you are aware, the Decree in *United States vs. Paramount Pictures, Inc., et al.*, Equity No. 87-273, in the District Court of the United States for the Southern District of New York prohibits the performance after June 30 next of certain pooling agreements. We suggest that for convenience in accounting the operating arrangements between the Fifth Avenue and Alto terminate at the close of business on June 24 next, but if you desire the arrangements to continue to June 30, 1947 or to terminate on a date earlier than June 30, 1947, please advise us and we shall accept whatever date you desire. If you do not advise us that you desire a termination date earlier than June 30, 1947, we shall consider that the termination shall be June 30, 1947.

Very truly yours,

UNITED WEST COAST THEATRES
CORPORATION

By s/ John B. Bertero

Vice President

FOX WEST COAST AGENCY CORPORATION

By s/ John B. Bertero

Vice President

JBB:DH

Enc.

reg. mail/rr [14]

To: South Side Theatres, Inc., a corporation; and South Side Associates, a joint venture consisting of Marco Wolff, Fanchon Simon, Roy N. Wolff and Rube Wolff, doing business under the name of South Side Associates.

Whereas, under date of April 1, 1941, South Side Theatres, Inc., Fox West Coast Agency Corporation and United West Coast Theatres Corporation, executed an Agreement providing for the operation of the Fifth Avenue Theatre premises and the Alto Theatre premises, as more particularly described in said Agreement, as a joint venture, which Agreement is hereinafter referred to as the "Venture Agreement"; and

Whereas, by another Agreement, hereinafter referred to as the "Termination Agreement", also executed by South Side Theatres, Inc., Fox West Coast Agency Corporation and United West Coast Theatres Corporation and dated April 1, 1941 (a photostatic copy of which is hereto annexed as Exhibit "A") it was provided that said Venture Agreement might be terminated forthwith at the election of any of the parties upon the happening of certain events described in said Termination Agreement; and

Whereas, there has occurred one or more of the events, the occurrence of which, by the terms of said Termination Agreement, permits the termination of said Venture Agreement forthwith at the election of any of said parties; and

Whereas, the undersigned, United West Coast Theatres Corporation and Fox West Coast Agency Corporation,

elect to terminate said Venture Agreement pursuant to the provisions of said Termination Agreement;

You Will Please Take Notice, that the undersigned [15] do, and each of them does, hereby elect to terminate forthwith said Venture Agreement.

Dated this 10th day of June, 1947.

UNITED WEST COAST THEATRES
CORPORATION

(Corporate Seal) By JOHN B. BERTERO
Vice President

By T. H. SWORD
Secretary

FOX WEST COAST AGENCY CORPORATION

(Corporate Seal) By JOHN B. BERTERO
Vice President

By T. H. SWORD
Secretary [16]

EXHIBIT "C"

June 27, 1947

South Side Theatres, Inc.
South Side Associates
6838 Hollywood Boulevard
Hollywood 28, California
Gentlemen:

Pursuant to the Decree in United States of America vs. Paramount Pictures, Inc., et al., Equity No. 87-273, in the District Court of the United States for the Southern District of New York, the undersigned, United West Coast Theatres Corporation, will terminate all its interest in the operations of the Alto Theatre, Los Angeles, California, at midnight, June 30, 1947, and effective at that time will fully comply in every particular with Paragraph 2 of Section III of said Decree.

Will you be good enough to have a representative at the Alto Theatre at midnight, June 30 next, to take complete possession of the theatre, to inventory the equipment and operating supplies and to do such other things as may be necessary at the theatre premises upon cessation of the joint operation of the Fifth Avenue Theatre, Inglewood, with the Alto Theatre, Los Angeles.

Very truly yours,

UNITED WEST COAST THEATRES
CORPORATION

By JOHN B. BERTERO

Vice President

Approved:

FOX WEST COAST AGENCY CORPORATION

By JOHN B. BERTERO

Vice President

JBB:DH

reg./rr

[Endorsed]: Filed Jul. 1, 1947. Edmund L. Smith,
Clerk. [17]

[Title of District Court and Cause]

ORDER TO SHOW CAUSE AND APPOINTMENT
OF TEMPORARY RECEIVER

Upon reading the verified complaint of plaintiffs in this action and it appearing to the satisfaction of the court therefrom that this is a proper case for the appointment of a receiver,

It Is Hereby Ordered that Frank Millan be and he is hereby appointed temporary receiver to take charge of and operate the Alto Theatre Building and the Alto Theatre located therein at 8862 South Western Avenue, Los Angeles, California, referred to in the complaint herein, and said receiver shall before entering upon the discharge of his duties file a good and sufficient bond in the sum of \$5000.00. Immediately after his qualification said receiver shall take possession of [18] said theatre building and said theatre and all of the property connected with and used in the operation thereof and shall operate the same as a motion picture theatre and collect all rent due from tenants of said real property and to that end he shall employ or continue the employment of all necessary agents and employees, shall obtain motion pictures for exhibition in said theatre and generally shall do all things necessary to continue the operation of said building and said theatre.

It Is Further Ordered that a copy of this order be served upon defendants South Side Theatres, Inc. and South Side Associates and that they be and appear before this court in Court Room 6, United States Court House, Los Angeles, California, on July 7th, 1947, at 10 o'clock a. m., then and there to show cause why the appointment of said receiver shall not be made permanent and until the further order of this court.

Dated: July 1st, 1947.

BEN HARRISON

Judge

[Endorsed]: Filed Jul. 1, 1947. Edmund L. Smith,
Clerk. [19]

[Title of District Court and Cause]

RETURN ON ORDER TO SHOW CAUSE

As cause why the appointment of the receiver should not be made permanent, the defendants show—

1. The jurisdiction of this action is exclusively in the District Court of the United States for the Southern District of New York and the Supreme Court of the United States. The relief prayed for by the plaintiffs will require this court to enter a judgment to the effect that action taken by the plaintiffs is or is not in compliance with a judgment entered by the United States District Court for the Southern District of New York and now before the Supreme Court of the United States for affirmance, reversal or modification.

2. The complaint fails to state a claim upon which relief can be granted. [21]

3. The complaint states an incomplete and misleading part of the judgment of the New York Court, and precludes an intelligent construction and application thereof.

4. The Fifth Avenue and Alto theatres are not normally in competition, within the meaning of the judgment of the New York District Court.

5. The plaintiffs in this case are not parties to the case in the New York District Court, and for that reason the judgment of that court does not apply to them and to the contract to which they are parties, and which the plaintiffs attempt to abrogate.

6. Twentieth Century-Fox Film Corporation and National Theatres Corporation are not parties to the contract stated in the complaint, and for that reason the judgment of the New York District Court does not apply to that contract.

7. On July 20, 1938, the United States of America filed a petition in the District Court of the United States for the Southern District of New York, against 166 corporations and individuals engaged in the business of producing, distributing and exhibiting motion pictures throughout the United States, charging them with engaging in a conspiracy to restrain and monopolize interstate trade and commerce in motion pictures. Three principal means of effecting the restraint and monopoly were charged to be in use by the defendants; i. e., (1) concerted refusal to supply pictures to independent exhibitors, like the defendants in this case, except upon terms concertedly established by the conspirators; (2) the acquisition of theatres; [22] and (3) divisions of territory among the conspirators for the exhibition of pictures.

8. Independent exhibitors like the defendants in this case, are the conspicuous victims of the conspiracy stated in that case. The great burden of the complaint in that case is a recitation of the injuries and restraints imposed on them.

9. The defendants in this case are among the many victims of the conspiracy, restraint and monopoly stated in the petition and complaint in the Government case. The Fifth Avenue Theatre, which is the subject of the contract stated in the complaint herein, was originated and built by the defendants in this case, and represented a business opportunity and enterprise in which they were entitled to engage under the law. It was taken from them by the plaintiffs in this case with the assistance of the conspirators named in the Government case, by the unlawful acts and economic violence stated in the petition and complaint in that case.

10. During the period from August 1, 1939, to March 20, 1940, the defendants in this case constructed the Fifth

Avenue Theatre. The conspirators named in the Government case refused to furnish pictures for use at that theatre. Shortly after construction of the Fifth Avenue Theatre was begun the plaintiffs in this case and Twentieth Century-Fox Film Corporation, National Theatres Corporation, Charles P. Skouras, Spyros P. Skouras, and other persons unknown, acquired land and constructed a theatre near the Fifth Avenue Theatre, called the Academy Theatre. The conspirators named [23] in the petition and complaint in the Government case did not refuse to furnish pictures for use at the Academy Theatre. During the period from March 20, 1940, to April 1, 1941, the Fifth Avenue Theatre was closed, unused and dark, because of the refusal of the conspirators to furnish pictures.

11. On or about February 1, 1941, the persons and corporations above named, demanded of the defendants in this case that they transfer and convey to them all of the title, ownership and interest in the real estate and personal property of the Fifth Avenue Theatre, that they cease to independently engage in the motion picture exhibition business at the Alto Theatre, and transfer to them the exclusive possession, use, operation, supervision, management and control of the Alto Theatre and of the motion picture business there conducted; and represented that upon compliance with that demand, and not otherwise, they would procure pictures from the other conspirators for use at the Alto and Fifth Avenue theatres, on terms and conditions necessary and appropriate for the successful and profitable operation of the businesses at those theatres, and would deliver to the defendants forty-nine percent of the profits of the operation of the Alto and Fifth Avenue theatres.

12. Because of the conspiracy and the restraint aforesaid, the defendants were suffering great and irreparable injury and damage in their business and property at the Alto and Fifth Avenue theatres. Because there was no other alternative, and for the purpose of reducing the injury and damage, [24] the defendants complied with the demands, and, on or about April 1, 1941, conveyed to the plaintiffs the real estate and personal property of the Fifth Avenue Theatre, and entered into a contract transferring to them the exclusive possession, use, operation, supervision, management and control of the Alto Theatre and of the business there conducted.

13. Since on or about April 1, 1941, to the present time, the plaintiffs have had exclusive possession, use, operation, supervision, management and control of the Alto and Fifth Avenue theatres and of the motion picture businesses there conducted, and they have controlled, regulated, and restrained the business of the Alto and Fifth Avenue theatres to prevent and restrain competition by those theatres with the Academy Theatre.

14. The plaintiffs have a complete and adequate remedy in the District Court of the United States for the Southern District of New York.

Attached to and made a part of this return are the following documents:

Exhibit 1: A copy of the Petition filed July 20, 1938, by the United States of America in the District Court of the United States for the Southern District of New York, in the case of United States of America v. Paramount Pictures, Inc., Twentieth Century-Fox Film Corporation, National Theatres Corporation, Spyros P. Skouras et al., Civil Action No. 87-273, charging them

with violations of the Sherman Antitrust Act, by conspiring to restrain interstate trade and commerce in the production, distribution and exhibition of motion pictures. [25]

Exhibit 2: A copy of the Amended and Supplemental Complaint in the above described case, filed November 14, 1940.

Exhibit 3: A copy of the Answer of Twentieth Century-Fox Film Corporation in the above described case.

Exhibit 4: A copy of the Answer of National Theatres Corporation in the above described case.

Exhibit 5: A copy of the Findings of Fact and Conclusions of Law in the above described case, filed December 31, 1946.

Exhibit 6: A copy of the Decree in the above described case, filed December 31, 1946.

Exhibit 7: Copies of the Petitions for appeals filed by Twentieth Century-Fox Film Corporation, National Theatres Corporation and other defendants in the above described case; assignments of errors and prayers for reversal, and order allowing appeals.

Exhibit 8: Copies of the Paramount defendants' Separate Petitions for appeal, assignments of errors, and order allowing appeals.

Exhibit 9: Copies of the Petition for appeal filed by the United States of America in the above described case; assignment of errors and prayer for reversal, and order allowing appeal.

Exhibit 10: A copy of an Order of the Supreme Court of the United States staying enforcement of certain provisions of the [26] decree in the above described case, dated April 7, 1947.

Exhibit 11: A copy of an order of the Supreme Court of the United States staying the enforcement of certain provisions of the decree in the above described case, dated June 13, 1947.

Exhibit 12: A copy of a Statement as to Jurisdiction filed by the United States of America in the Supreme Court of the United States, on May 8, 1947, in the case of United States of America v. Paramount Pictures, Inc., et al., No. 79, October Term 1946.

MACFARLANE, SCHAEFER & HAUN
HENRY SCHAEFER, JR.
WILLIAM P. GAMBLE
JAMES H. ARTHUR

By Henry Schaefer, Jr.

Attorneys for Defendants

RUSSELL HARDY
Of Counsel [27]
[Verified.]

Aug. 28-47

Pleadings having been prepared by out of State counsel Provisions of Rule 4 waived.

JACOB WEINBERGER

Judge [28]

EXHIBIT 1

Petition filed July 20, 1938, by the United States of America in the District Court of the United States for the Southern District of New York, in the case of United States v. Paramount Pictures, Inc., et al. [29]

Equity No. 87—273

In the District Court of the United States
for the Southern District of New York

UNITED STATES OF AMERICA, Petitioner
v.
PARAMOUNT PICTURES, INC., et al., Defendants

PETITION

LAMAR HARDY,
United States Attorney.

HOMER CUMMINGS,

Attorney General,

THURMAN ARNOLD,

Assistant Attorney General,

WENDELL BERGE,

JOHN J. ABT,

PAUL WILLIAMS,

J. STEPHEN DOYLE, JR.,

JOHN F. CLAGETT,

Special Assistants to the Attorney General.

Filed July 20, 1938 [30]

INDEX

	Page
Parties defendant.....	1-5
Parent companies	1
Paramount	2
Loew's	2
R-K-O	3
Warner Bros.	3
Twentieth Century-Fox	4
Columbia	4
Universal	5
United Artists	5
I. Jurisdiction and Venue.....	5
II. Description of Defendants.....	6-27
Paramount	6
Loew's	9
R-K-O	11
Warner Bros.	15
Twentieth Century-Fox	17
Columbia	20
Universal	23
United Artists	25
III. History of the Motion Picture Industry.....	27-44
IV. Description of the Industry.....	44-78
(A) Branches of the Industry.....	44
(1) Production	45
(2) Distribution	50
(3) Exhibition	54

	Page
(B) Competitive Conditions in the Industry	69
(1) Exhibition in affiliated first-run metropolitan theatres.....	70
(2) Exhibition in affiliated circuits	72
(3) Affiliated theatre market comfortably filled by product of defendants, to exclusion of independent producers.....	74
(4) Loaning of players.....	75
(5) Marketing methods, overselling and overbuying.....	75
(6) Refusal to sell second or other subsequent runs.....	77
(7) Buyers' and sellers' markets in motion picture industry.....	78
(I) [31]	

II.

V. Interstate Commerce.....	79-83
VI. Offenses Charged	83-111
(A) Monopoly of exhibition in first-run metropolitan theatres.....	84
(B) Nationwide monopoly of exhibition by producer-exhibitor defendants....	88
(C) Monopoly of production.....	95
(1) Contract directors.....	96
(2) Contract players	97

	Page
(D) Trade practices imposed upon independent exhibitors.....	101-107
(1) Block booking	101
(2) Forcing of short subjects.....	102
(3) Arbitrary designation of play dates	103
(4) Protection	103
(5) Overbuying	104
(6) Arbitrary, unconscionable and discriminatory film rentals....	104
(7) Prohibition of double features	106
(8) Score charges.....	107
(9) Minimum admissions	107
(E) Benefits, favors and advantages extended by the defendants to each other	108-111
(1) Sharing advertising costs....	108
(2) Optional contracts.....	108
(3) Contract modifications	109
(4) Overage and Underage.....	110
(5) Cancellation of short subjects	110
(6) Move-overs	111
VII. Conclusion	111-114
VIII. Prayer	115-118

In the District Court of the United States
for the Southern District of New York

In Equity No. 87—273

UNITED STATES OF AMERICA, Petitioner

v.

PARAMOUNT PICTURES, INC., et al., Defendants

PETITION

To the Honorable, the Judges of the District Court of
the United States for the Southern District of New
York, Sitting in Equity.

The United States of America, by Lamar Hardy,
United States Attorney for the Southern District of
New York, acting under the direction of the Attorney
General, brings this proceeding in equity against:

Paramount Pictures, Inc.; Loew's, Incorporated;
Irving Trust Company, New York, New York, Trustee
in Bankruptcy for Radio-Keith-Orpheum Corporation;
Warner Bros. Pictures, Inc.; Twentieth Century-Fox
Film Corporation; Columbia Pictures Corporation; Uni-
versal Corporation; and United Artists Corporation—
hereinafter referred to as the parent companies; and
the [33]

or preferred-run exhibition of motion pictures throughout the United States wherever any theatres affiliated with the producer-exhibitor defendants, or any one or more of them, operate or exist.

(187) As pointed out in paragraph 50, *supra*, the producer-exhibitor defendants, in acquiring circuits of affiliated theatres, have not gone into the same competitive areas to any appreciable extent, and then only in certain densely populated metropolitan areas where patronage is sufficient for all producer-exhibitor defendants operating in such areas. On the contrary, generally speaking, each producer-exhibitor defendant has gone into a territory, or territories, for the acquisition of theatres by it, not occupied by any of the other producer-exhibitor defendants. A statement of the affiliated theatre holdings of each of the producer-exhibitor defendants throughout the United States, together with the location of the theatres of each, by States, appears in paragraphs 122 to 126, inclusive, *supra*.

(188) In the acquisition of theatres, each of the defendant producer-exhibitors has acquired one or more theatres through purchase, lease, or operating agreement from independent exhibitors. By reason of the power and position in the industry enjoyed by the said producer-exhibitor defendants, and each of them, and, as a result of their assurance of product for exhibition in those theatres, independent exhibitors, in some instances, have been compelled to sell or dispose of their theatres to the producer-exhibitor defendants, or some of them, as a result of coercive methods employed by the said [121]

producer-exhibitor defendants, or some of them. The said coercive methods so employed are sometimes referred to in the industry, particularly by independent exhibitors, as "distress methods." The said methods have included the following: threats of building a theatre, or theatres, in opposition to the independent exhibitor if he does not agree to sell; threats to deprive the independent exhibitor of product, or desirable product, if he does not agree to sell; the purchase of theatre sites in the neighborhood of the independent exhibitor, with the suggestion conveyed to the independent exhibitor, either directly or through third parties, that the major producer-exhibitor in question intends to build and open a theatre on the new site if the independent exhibitor will not agree to sell; threats to purchase an equity or interest in the independent theatre for the purpose of gaining control through reorganization or otherwise and the imposition upon the independent exhibitor of arbitrary and unreasonable clearance and zoning schedules. The occasions and circumstances wherein and whereunder some or all of these methods have been used by the producer-exhibitor defendants, or some of them, are too numerous to mention herein, but have occurred in all sections of the United States.

(189) The acquisition of affiliated theatres in different sections and areas of the United States by the producer-exhibitor defendants has resulted in a division of territory between them, so that, in effect, each producer-exhibitor defendant, acting [122]

EXHIBIT 2.

Amended and Supplemental Complaint,
filed November 14, 1940. [152]

Civil Action No. 87-273

In the District Court of the United States for
the Southern District of New York

UNITED STATES OF AMERICA, Plaintiff

v.

PARAMOUNT PICTURES, INC., et al., Defendants

AMENDED AND SUPPLEMENTAL COMPLAINT

JAMES V. HAYES,
ROBERT L. WRIGHT,
ROBERT E. SHER,
J. STEPHEN DOYLE, JR.,
JOHN F. CLAGETT

Special Assistants to the Attorney General,

JAMES M. MALLOY,
J. FRANK CUNNINGHAM,
SEYMOUR SIMON,

Special Attorneys.

ROBERT H. JACKSON,

Attorney General,

THURMAN ARNOLD,

Assistant Attorney General,

JOHN T. CAHILL,

United States Attorney.

Filed November 14, 1940 [153]

In the District Court of the United States for
the Southern District of New York

Civil Action No. 87-273

United States of America, Plaintiff, v. Paramount Pictures, Inc.; Paramount Film Distributing Corporation, Loew's, Incorporated; Radio-Keith-Orpheum Corporation; RKO Radio Pictures, Inc.; Keith-Albee-Orpheum Corporation; RKO Proctor Corporation; RKO Midwest Corporation; Warner Bros. Pictures, Inc.; Vitagraph, Inc.; Warner Bros. Circuit Management Corporation; Twentieth Century-Fox Film Corporation; National Theatres Corporation; Columbia Pictures Corporation; Screen Gems, Inc.; Columbia Pictures of Louisiana, Inc.; Universal Corporation; Universal Pictures Company, Inc.; Universal Film Exchanges, Inc.; Big U Film Exchange, Inc.; and United Artists Corporations, Defendants.

AMENDED AND SUPPLEMENTAL COMPLAINT

Leave of Court having been first obtained, the United States of America, by its attorneys, acting under the direction of the Attorney General of the United States, hereby amends and supplements the petition filed herein on July 20, 1938, and the bills of particulars filed pursuant thereto, by substituting therefor this amended and supplemental complaint against the following defendants:

(1) [154]

* * * * *

been completed to another theatre operated by the same circuit for a continued run or exhibition. This practice, which is generally confined to metropolitan areas, reduces the box-office value of a picture when it reaches subsequent-run exhibitors. This privilege is seldom, if ever, extended to independent exhibitors.

(p) Overbuying

In many instances such a circuit of theatres is knowingly permitted by the defendants to contract for the exhibition in certain theatres operated by it of more films than such theatres can profitably exhibit for the purpose of withholding such films from competing independent exhibitors who need them in order to operate their theatres. Many pictures so licensed by such circuit theatres are never exhibited by them because of their lack of screen-time to play them, and yet they are released to competing independent exhibitors, if at all, only after the elapse of such a length of time after their release that their exhibition value has been substantially diminished. In other cases, the circuit theatres actually exhibit all of the pictures licensed by them by following a policy of making a greater number of weekly program changes than are necessary to met the entertainment requirements of their patrons.

B. Conspiracies to unreasonably restrain and monopolize the exhibition of motion pictures participated in by the producer-exhibitor defendants

150. All of the producer-exhibitor defendants, each well knowing all of the matters and things hereinbefore alleged, for many years last past, have combined and conspired with each other to unreasonably restrain and [223]

monopolize and pursuant to said combinations and conspiracies have in fact unreasonably restrained and monopolized, trade and commerce in the exhibition of motion pictures in the United States, in violation of Sections 1 and 2 of the Sherman Act, in the following manner:

151. By concertedly conditioning the licensing of films distributed by one producer-exhibitor defendant in theatres operated by another such defendant upon the licensing of films distributed by the latter defendant in the theatres operated by the former defendant.

152. By concertedly excluding independently produced films from affiliated theatres.

153. By concertedly excluding unaffiliated exhibitors from the operation of competing first-run theatres in cities and towns where affiliated theatres are located.

154. By concertedly excluding unaffiliated exhibitors from operating competing theatres on the same run as the subsequent-run affiliated theatres in the cities and towns where such affiliated theatres are located.

155. By concertedly using the first and early-run affiliated theatres to control the film supply, run, clearance and admission prices of operators of competing unaffiliated theatres in the cities and towns in which affiliated theatres are located.

156. By concertedly coercing and intimidating unaffiliated exhibitors located in towns where there are no affiliated theatres to license their films upon arbitrary terms by expressed or implied threats to build or acquire a competing theatre and use it to destroy the business of the unaffiliated exhibitor. [224]

157. By concertedly coercing and intimidating exhibitors located in town where affiliated theatres are located or where an affiliated exhibitor desires to locate into relinquishing control of his theatre or a share of the profits thereof to the affiliated exhibitor by expressed or implied threats to deprive him of access to films necessary to the successful operation of his theatre or to so limit the terms and conditions on which he licenses such films that they may no longer be profitably exhibited by him.

158. By pooling or otherwise sharing with each other the profits of affiliated theatres owned or controlled by two or more producer-exhibitor defendants, located in the same competitive area and frequently operating on the same run, which would operate in competition with each other except for such pooling or profit sharing agreements.

159. By agreeing to divide the available films among affiliated theatres owned or controlled by two or more producer-exhibitor defendants located in the same competitive area, without competitive negotiations, in situations where such theatres would otherwise compete with each other for such films.

160. By entering into joint arrangements with respect to a single theatre, whereby the film buying control or proceeds from operation thereof is divided between two or more producer-exhibitor defendants.

161. By concertedly refraining from building, buying or offering to lease theatres in areas where they might compete with existing affiliated theatres, except under agreements preventing competition such as those noted in paragraphs 158, 159 and 160 above. [225]

EXHIBIT 6.

Decree, filed December 31, 1946. [277]

69

United States District Court
Southern District of New York

Equity No. 87-273

United States of America, Plaintiff, against Paramount Pictures, Inc., Paramount Film Distributing Corporation, Loew's, Incorporated, Radio-Keith-Orpheum Corporation, RKO Radio Pictures, Inc., Keith-Albee-Orpheum Corporation, RKO Proctor Corporation, RKO Midwest Corporation, Warner Bros. Pictures, Inc., Vitagraph, Inc., Warner Bros. Circuit Management Corporation, Twentieth Century-Fox Film Corporation, National Theatres Corporation, Columbia Pictures Corporation, Screen Gems, Inc., Columbia Pictures of Louisiana, Inc., Universal Corporation, Universal Pictures Company, Inc., Universal Film Exchanges, Inc., Big U Film Exchange, Inc., and United Artists Corporation, Defendants.

DECREE

The court having rendered its opinion herein on June 11, 1946, having duly considered the proposals of the parties and of amici curiae as to its findings and judgment, and having filed its findings of fact and conclusions of law, wherein certain of the defendants herein were found to have violated the Act of Congress approved July 2, 1890, 26 Stat. 209, commonly known as the Sherman Act, [278]

It Is Hereby Ordered, Adjudged and Decreed, as follows:

I.

1. The complaint is dismissed as to the defendants Screen Gems, Inc. and the corporation named as Universal Pictures Company, Inc., merged during the pendency of this case into the defendant Universal Corporation. The complaint is also dismissed as to all claims made against the remaining defendants herein based upon their acts as producers, whether as individuals or in conjunction with others.

II.

Each of the defendant distributors, Paramount Pictures, Inc.; Paramount Film Distributing Corporation; Loews, Incorporated; Radio-Keith-Orpheum Corporation; RKO Radio Pictures, Inc.; Warner Bros. Pictures, Inc.; Warner Bros. Pictures Distributing Corporation [formerly known as Vitagraph, Inc.]; Twentieth Century-Fox Film Corporation; Columbia Pictures Corporation; Columbia Pictures of Louisiana, Inc.; Universal Corporation; Universal Film Exchanges, Inc.; Big U Film Exchange, Inc.; and United Artists Corporation; and the successors of each of them, and any and all individuals who act in behalf of any thereof with respect to the matters enjoined, and each corporation in which said defendants or any of them own a direct or indirect stock interest of more than fifty per cent, is hereby enjoined:

1. From granting any license in which minimum prices for admission to a theatre are fixed by the parties, either in writing or through a committee, or through arbitration, or upon the happening of any event or in any manner or by any means.

2. From agreeing with each other or with any exhibitors or distributors to maintain a system of clearances; the term "clearances" as used herein meaning the period of time stipulated in license contracts which must elapse between runs of the same feature within a particular area or in specified theatres.

3. From granting any clearance between theatres not in substantial competition.

4. From granting or enforcing any clearance against theatres in substantial competition with the theatre receiving the license for exhibition in excess of what is reasonably necessary to protect the license in the run granted. Whenever any clearance provision is attacked as not legal under the provisions of this decree, the burden shall be upon the distributor to sustain the legality thereof.

5. From further performing any existing franchise to which it is a party and from making any franchises in the future. The term "franchise" as used herein means a licensing agreement or series of licensing agreements, entered into as a part of the same transaction, in effect for more than one motion picture season and covering the exhibition of pictures released by one distributor during the entire period of agreement.

6. From making or further performing any formula deal or master agreement to which it is a party. The term "formula deal" as used herein means a licensing agreement with a circuit of theatres in which the license fee of a given feature is measured for the theatres covered by the agreement by a specified percentage of the feature's national gross. The term "master agreement" means a licensing agreement, also known as a "blanket deal" covering the exhibition of features in a number of theatres usually comprising a circuit.

7. From performing or entering into any license in which the right to exhibit one feature is conditioned upon the licensee's taking one or more other features. To the extent [279] that any of the features have not been trade shown prior to the granting of the license for more than a single feature, the licensee shall be given by the licensor the right to reject twenty per cent of such features not trade shown prior to the granting of the license, such right of rejection to be exercised in the order of release within ten days after there has been an opportunity afforded to the licensee to inspect the feature.

8. From licensing in the future any feature for exhibition in any theatre, not its own, in any manner except the following:

(a) A license to exhibit each feature released for public exhibition in any competitive area shall be offered to the operator of each theatre in such area who desires to exhibit it on some run [other than that upon which such feature is to be exhibited in the theatre of the licensor] selected by such operator, and upon uniform terms;

(b) Each license shall be granted solely upon the merits and without discrimination in favor of affiliates, old customers or others;

(c) Where a run is desired, or is to be offered, upon terms which exclude simultaneous exhibition in competing theatres, the distributor shall notify, not less than thirty days in advance of the date when bids will be received, all exhibitors in the competitive area, offering to license the features upon one or more runs, and in such offer shall state the amount of a flat rental as the minimum for such license for a

specified number of days of exhibition, the time when the exhibition is to commence and the availability and clearance, if any, which will be granted for each such run. Within fifteen days after receiving such notice, any exhibitor in such competitive area may bid for such license, and in his bid shall state what run such exhibitor desires and what he is willing to pay for such feature, which statement may specify a flat rental, or a percentage of gross receipts, or both, or any other form of rental, and shall also specify what clearance such exhibitor is willing to accept, the time and days when such exhibitor desires to exhibit it, and any other offers which such exhibitor may care to make. The distributor may reject all offers made for any such feature, but in the event of the acceptance of any, the distributor shall grant such license upon the run bid for to the highest responsible bidder, having a theatre of a size, location and equipment adequate to yield a reasonable return to the licensor. The method of licensing specified in this subdivision shall not be required in areas where there is no competition among theatres or in run, or in which there is no offer made by any exhibitor within the time above mentioned. The words "exclude simultaneous exhibition" shall be held to mean the exhibition of a specified run in one theatre with clearance over other theatres in the competitive area. The words "competitive area" shall refer to the territory occupied by more than one theatre in which it may fairly and reasonably be said that such theatres compete with each other for the exhibition of features on any run.

(d) Each license shall be offered and taken theatre by theatre and picture by picture.

(e) A theatre is not a defendant's own theatre unless it owns therein a legal or equitable interest of ninety-five per cent or more, either directly or through affiliates or subsidiaries.

9. From arbitrarily refusing the demand of an exhibitor, who operates a theatre in competition with another theatre not owned or operated by a defendant distributor, or its affiliate or subsidiary, made by registered mail, addressed to the home office of the distributor, to license a feature to him [280] for exhibition on a run selected by the exhibitor, instead of licensing it to another exhibitor for exhibition in his competing theatre on such run. Such demand shall be deemed to have been refused either upon the receipt by the exhibitor of a refusal in writing or upon the expiration of ten days after the receipt of the exhibitor's demand.

III.

Each of the defendant exhibitors, Paramount Pictures, Inc., Loews, Incorporated, Radio-Keith-Orpheum Corporation, Keith-Albee-Orpheum Corporation, RKO Proctor Corporation, RKO Midwest Corporation, Warner Bros. Pictures, Warner Bros. Circuit Management Corporation, Twentieth Century-Fox Film Corporation, and National Theatres, Inc. is hereby enjoined and restrained:

(1) From performing or enforcing agreements referred to in paragraphs 5 and 6 of the foregoing section II hereof to which it may be a party.

(2) From making or continuing to perform pooling agreements whereby given theatres of two or more exhibitors normally in competition are operated as a unit or whereby the business policies of such exhibitors are col-

lectively determined by a joint committee or by one of the exhibitors or whereby profits of the "pooled" theatres are divided among the owners according to prearranged percentages.

(3) From making or continuing to perform agreements that the parties may not acquire other theatres in a competitive area where a pool operates without first offering them for inclusion in the pool.

(4) From making or continuing leases of theatres under which it leases any of its theatres to another defendant or to an independent operating a theatre in the same competitive area in return for a share of the profits.

(5) From continuing to own or acquiring any beneficial interest in any theatre, whether in fee or shares of stock or otherwise, in conjunction with another defendant, and from continuing to own or acquire such an interest in conjunction with an independent [meaning any former, present or putative motion picture theatre operator which is not owned or controlled by the defendant holding the interest in question], where such interest shall be greater than five per cent unless such interest shall be ninety-five per cent or more. The existing relationships which violate this provision shall be terminated within two years. The relationships between the defendants and independents which violate this provision shall be terminated by a sale to, or purchase from the co-owner or co-owners, or by a sale to a party not one of the other defendants. In dissolving relationships among defendants and between defendants and independents which violate this provision,

one defendant may acquire the interest of another defendant or independent if such defendant desiring to acquire such interest shall show to the satisfaction of the court, and the court shall first find, that such acquisition will not unduly restrain competition in the exhibition of feature motion pictures. Each of the defendants shall submit to this court within six months a statement outlining the extent to which it has complied and the manner in which it proposes to comply with this provision, setting forth in detail the names, locations, and general descriptions of the theatres, corporate securities, and beneficial interests of any kind involved, the sales thereof that it has made, and such interests as it proposes to acquire, with a statement of facts regarding each competitive situation involved in such proposed acquisition sufficient to show the probable effect of such acquisition on that situation. Similar reports shall be made quarterly thereafter until this provision shall have been fully complied with. Reasonable notice of such acquisition plans shall be served upon the Attorney General and plaintiff shall be given an opportunity to be heard with respect thereto before any such acquisition shall be approved by the court. [281]

(6) From expanding its present theatre holdings in any manner whatsoever except as permitted in the preceding paragraph.

(7) From operating, booking, or buying features for any of its theatres through any agent who is known by it to be also acting in such manner for any other exhibitor, independent or affiliate.

IV.

Nothing contained in this Decree shall be construed to limit, in any way whatsoever, the right of each distributor-defendant to license, or in any way to arrange or provide for, the exhibition of any or all the motion pictures which it may at any time distribute, in such manner, and upon such terms, and subject to such conditions as may be satisfactory to it, in any theatre in which such distributor-defendant has or may acquire pursuant to the terms of this Decree, a proprietary interest of ninety-five per cent or more either directly or through subsidiaries.

V.

The provisions of the existing consent decree are hereby declared to be of no further force or effect, except insofar as may be necessary to conclude arbitration proceedings now pending and to liquidate in an orderly manner the financial obligations of the defendants and the American Arbitration Association, incurred in the establishment of the consent decree arbitration systems. Existing awards and those made pursuant to pending proceedings shall continue to be enforceable. But this shall in no way preclude the parties or any other persons from setting up a reasonable system of arbitration either through the use of the present boards or any others as among themselves.

VI.

For the purpose of securing compliance with this Decree, and for no other purpose, duly authorized repre-

representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of antitrust matters, and on notice to any defendant, reasonable as to time and subject matter, made to such defendant at its principal office, and subject to any legally recognized privilege, (1) be permitted reasonable access, during the office hours of such defendant, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of such defendant, relating to any of the matters contained in this Decree, and that during the times that the plaintiff shall desire such access, counsel for such defendant may be present, and (2) subject to the reasonable convenience of such defendant, and without restraint or interference from it, be permitted to interview its officers or employees regarding any such matters, at which interview counsel for the officer or employee interviewed and counsel for such defendant company may be present.

Information obtained pursuant to the provisions of this section shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice, except in the course of legal proceedings to which the United States is a party, or as otherwise required by law.

VII.

Paragraphs 7 and 8 of section II of this judgment shall not become effective until July 1, 1947. [282]

VIII.

Jurisdiction of this cause is retained for the purpose of enabling any of the parties to the judgment and no others, to apply to the court at any time for such orders or direction as may be necessary or appropriate for the construction, modification, or carrying out of the same, for the enforcement of compliance therewith, and for the punishment of violations thereof, or for other or further relief.

IX.

The operation of this judgment is stayed for sixty days from the date hereof, and, if an appeal is taken, for thirty days thereafter in order to enable any appellant to move before the Supreme Court for a stay in respect to any portion of the judgment from which an appeal has been taken.

Dated, December 31, 1946.

AUGUSTUS N. HAND

United States Circuit Judge

HENRY W. GODDARD

United States District Judge

JOHN BRIGHT

United States District Judge [283]

* * * * *

[Endorsed]: Filed Aug. 28, 1947. Edmund L. Smith,
Clerk. [284]

In the District Court of the United States
Southern District of California
Central Division

No. 7282-BH

UNITED WEST COAST THEATRES CORPORA-
TION, et al.,

Plaintiffs,

vs.

SOUTH SIDE THEATRES, INC., et al.,

Defendants,

and

TWENTIETH CENTURY-FOX FILM CORPORA-
TION, et al.,

Third Party Defendants.

ORDER TO SHOW CAUSE

Good cause appearing, the court on its own motion directs that all parties interested in the above entitled action, appear before this court on Monday, June 21, 1948, at 10:00 o'clock A. M., to show cause if any they have, why the above entitled action should not be dismissed upon the ground that said original cause of action has become moot and/or the Receiver heretofore appointed should not be discharged upon the ground that the necessity for said receivership no longer exists.

Dated: June 3rd, 1948.

BEN HARRISON

Judge

[Endorsed]: Filed Jun. 3, 1948. Edmund L. Smith,
Clerk. [353]

In the District Court of the United States for the
Southern District of California
Central Division

Civil Action No. 7282-BH

UNITED WEST COAST THEATRES CORPORA-
TION and FOX WEST COAST AGENCY COR-
PORATION,

Plaintiffs,

vs.

SOUTH SIDE THEATRES, INC. and MARCO
WOLFF, FANCHON SIMON, ROY N. WOLFF
and RUBE WOLFF, Joint Venturers, Doing Busi-
ness Under the Name of SOUTH SIDE ASSO-
CIATES,

Defendants.

ORDER ALLOWING TEMPORARY RECEIVER
INTERIM COMPENSATION

The Court having appointed Frank Millan temporary receiver to take charge of and operate the Alto Theatre Building and the Alto Theatre located therein at 8862 South Western Avenue, Los Angeles, California, and said temporary receiver having entered upon the discharge of his duties, and it appearing to the court that said temporary receiver is without independent means and without employment other than as such temporary receiver,

It Is Hereby Ordered that interim compensation in the amount of \$100.00 per week on account of said temporary receiver's fees be paid to him out of the funds coming into his hands from [354] the operation of the said Alto

Theatre Building and the Alto Theatre located therein, commencing July 1, 1947 and continuing until the further order of this court.

Dated: July 8, 1947.

BEN HARRISON

Judge

Approved:

MACFARLANE, SCHAEFER AND HAUN

By William Gamble

Attorneys for Defendants

[Endorsed]: Filed Jul. 8, 1947. Edmund L. Smith,
Clerk. [355]

[Title of District Court and Cause]

NOTICE OF MOTION TO DISMISS AND TO
SUMMON THE UNITED STATES OF AMERI-
CA AS A PARTY

To United West Coast Theatres Corporation and Fox
West Coast Agency Corporation, plaintiffs and to
Messrs. Loeb & Loeb, their attorneys.

You and Each of You Will Please Take Notice that on
the 8th day of September, 1947, at the hour of 10:00
o'clock A. M., in the courtroom of the Hon. Ben Harri-
son, Judge of the above entitled court, the defendants,
South Side Theatres, Inc., Marco Wolff, Fanchon Simon,
Roy N. Wolff and Rube Wolff, joint venturers, doing
business under the name of South Side Associates, will
move the Court as follows:

1. To dismiss the action on the grounds that the complaint fails to state a claim against the defendants upon which relief can [356] be granted; and that the above entitled Court is without jurisdiction to hear the matter;

2. To order the United States of America to be summoned to appear in this action.

This motion is based upon the accompanying memorandum of Points and Authorities.

Defendants reserve the right to answer the complaint on file herein after ruling of the Court on the foregoing motions.

Dated: August 25th, 1947.

MACFARLANE, SCHAEFER & HAUN
HENRY SCHAEFER, JR.
WILLIAM P. GAMBLE
JAMES H. ARTHUR

By Henry Schaefer, Jr.

Attorneys for Defendants

RUSSELL HARDY

Of Counsel [357]

Received copy of the within Notice of Motion to Dismiss, etc., this 26 day of Aug., 1947. Loeb & Loeb, by C. Young, attorneys for pltfs.

[Endorsed]: Filed Aug. 26, 1947. Edmund L. Smith, Clerk. [358]

[Title of District Court and Cause]

WAGE AGREEMENT APPROVAL

Petition is hereby presented to this Honorable Court for approval of the wage scale and working agreement executed between the Moving Picture Projectionists Local No. 150, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, and the Alto Theater, through Frank Millan, Receiver for the same, duly appointed by order of this Court, which agreement was executed February 4, 1948.

The agreement provides for an increase in wage scales and is the same generally as executed by other theaters in this area.

The agreement has been examined by William Gamble, of the Law Firm of Macfarlane, Schaefer & Haun, attorneys for defendants, and by Edward J. O'Connor, of the Law Firm of O'Connor & O'Connor, attorneys for the Receiver, Frank [359] Millan. The Agreement, which is attached to and made a part of this petition, is approved.

MACFARLANE, SCHAEFER & HAUN

By William Gamble

Attorneys for Defendants

O'CONNOR & O'CONNOR

By Edward J. O'Connor

Attorneys for Receiver

The same is hereby approved:

BEN HARRISON

United States District Judge [360]

WAGE SCALES
and
WORKING AGREEMENT

Between
MOVING PICTURE PROJECTIONISTS
LOCAL NO. 150

International Alliance of Theatrical Stage Employees and
Moving Picture Machine Operators of the
United States and Canada
and

For Alto Theatre
In Los Angeles, California

This Agreement made and entered into this.....
day of February, 1948, by and between.....
.....in the city of Los Angeles,
State of California, party of the first part, and Moving
Picture Projectionists, Local No. 150, International Al-
liance of Theatrical Stage Employees and Moving Picture
Operators of the United States and Canada (a voluntary
unincorporated association) of Los Angeles, State of
California, party of the second part;

Witnesseth:

Party of the first part hereby agrees to employ only
those Projectionists furnished by the party of the second
part in any and all projection rooms in which the party of
the first part is now, or may become, interested in during
the life of this agreement.

Party of the second part hereby agrees to supply the
party of the first part with Projectionists during the life
of this agreement, and to make every effort to keep these
positions filled with competent Projectionists.

It Is Mutually Agreed by the parties to this agreement that the following wage scales and working conditions shall be in effect during the life of this agreement: [361]

THEATRE OPERATING POLICY

1 Regular Projectionists per shift

4 Days of 5½ Hours each

2 Days of 10 Hours each

Sat. & Sun.

3 hours Preparatory Time per week
at straight time rate.

1 hour Build-up Time on change day at overtime rate.	Basic weekly rate per man \$101.25
---	---------------------------------------

Part-time Projectionist:

1 Days of 5½ Hours each

½ hour Preparatory Time at straight time rate.	Basic weekly rate per man \$13.50
---	--------------------------------------

SCHEDULE OF RATES

Basic Rate:	\$2.25 per hour
-------------	-----------------

Overtime:

From 8 A. M. to 12:30 midnight	\$3.38 per hour
--------------------------------	-----------------

From 12:30 midnight to 8 A. M.	\$3.38 per hour
--------------------------------	-----------------

Section 5, Page 3:	\$3.38 per hour
--------------------	-----------------

Section 15, Page 3:	\$3.38 per hour
---------------------	-----------------

Extra Matinees:

Legal Holidays: (New Year's Day, Memorial Day, Fourth of July, La- bor Day, Armistice Day, Thanks- giving Day and Christmas). (Mini- mum charge of four hours)	\$3.38 per hour
--	-----------------

Other Days: (Minimum charge of two hours)	\$3.38 per hour
--	-----------------

Extra Weekly Matinees:

If matinees are run daily for a period of two weeks or more, the straight time rate will be paid for these matinees.

If matinees are run daily for a period of less than two weeks, the extra matinee rate will be paid for these matinees. [362]

WORKING CONDITIONS

1. Projectionists shall work not more than six days per week. In theatres and projection rooms operating seven days per week a swing man shall be employed one day per week for each projectionist employed.

2. Vacations

A. Full Time Employees

Projectionists who have been regularly employed by the Company for one year or more, but less than two years, shall receive 1 weeks' vacation with pay. Projectionists who have been regularly employed by the Company for two years or more shall receive 2 weeks' vacation with pay. Employment time shall be retroactive and the vacation status of the projectionist shall be determined by his length of employment in a theatre or theatres regardless of the length of time of ownership. Vacation pay shall be at the base weekly rate per man as specified on Page 2 of this contract.

B. Part Time Employees

Projectionists regularly employed for one year or more, but less than two years, shall receive pro rata vacation time with pay. Projectionists who have been employed for two years or

more shall receive double the pro rata vacation time with pay.

- C. For the purpose of figuring vacation time, the fiscal year for each projectionist shall be established from the starting date of his employment, i.e: A projectionist starting to work in a theatre on July 15, 1947 would be entitled to a vacation on or after July 15, 1948.
- D. The Party of the Second Part agrees to furnish the Party of the First Part a record of employment for each projectionist upon his request for vacation.

3. A. Each projectionist on the opening shift shall report thirty (30) minutes ahead of show time for the necessary work to prepare the equipment for the start of the performance. Necessary work shall be defined as: checking sound system for proper operation, cleaning mirrors, condensers, lenses, machines, generators, rectifiers and any other pieces of equipment used in the projection room. No records or effects shall be run on preparatory time. No inspection of film or building up of show or trailers shall be done on preparatory time. Preparatory time shall be paid for at the straight time rate.

B. Each regular projectionist shall receive one-half hour build-up time each change day at overtime rate; this time to be used to prepare the film for running.

4. There shall be a minimum basic scale of \$1.50 per hour established in all theatres.

5. All overtime will be paid for at the rate of time and one-half of the basic hourly scale.

6. All regular performance time after 12:30 midnight will be paid for at the rate of time and one-half of the basic scale, irrespective of whether regular shift time is completed or not.

7. Overtime shall be paid for as follows: five to fifteen minutes, one quarter hour; more than fifteen minutes, one half hour; more than one half hour, forty-five minutes; more than forty-five minutes, one hour. This leeway is allowed for contingencies but is to be used in good faith and not as a regular daily practice.

8. Records or effects run before or after the performance will be considered as part of that performance and all projectionists working on that shift shall be on duty and shall be paid accordingly. [363]

9. Special Performances

A. Projectionists running a special performance in the morning or prior to the starting time of a scheduled matinee or a continuous daily policy shall receive overtime pay with a minimum of two hours. Any performance run in the morning or afternoon when no performance is regularly scheduled will be considered an extra matinee.

B. Projectionists running any performance or screening after the close of the regular performance shall receive overtime pay from the time the regular shift ends until completion of the work.

10. Projectionists called for stage show rehearsals, or screening of any film, before the regular performance shall receive overtime pay from the time designated to report for duty. There will be a minimum charge of two hours pay if there is more than one hour break between completion of work and starting time of the shift. If the work is done after the regular performance, projectionist shall receive overtime pay from the time the regular shift ends until completion of the work.

11. Theatres not operating on a continuous, or split, daily policy will pay extra matinee rate as shown in schedule on page two when running extra matinees.

12. Theatres running on an all-night policy seven days per week shall pay the hourly rate set forth in schedule on Page 2, with a guarantee of four and one-half hours per man per shift.

13. Road Shows

The Party of the First Part agrees that in all theatres of one-thousand seats or less running first run pictures advertised as road shows, or charging admission above established first-run admission, and not carrying equipment, and selling reserved seats, each projectionist shall receive six hours' pay at Class A scale for each performance. In theatres of more than one-thousand seats, selling reserved seats, there shall be two projectionists per shift, each projectionist shall receive six hours' pay at Class A scale for each performance. In all other theatres within the jurisdiction of Local 150 running first-run pictures advertised as Road Shows or charging admission above established first-run admission, and not selling reserved seats, the projectionist shall receive Class A scale for a six hour shift. Class A shall be

interpreted to mean Class A scale of Metropolitan Los Angeles.

14. At any time that theatres under the jurisdiction of Local 150 are used by Producers for testing or running pictures, and services of projectionists of Local 150 are required by the Producers, the scales entered into for this work by Local 150 with such Producers shall be acceptable to management.

15. All maintenance work outside of the projection room in such theatres where stage employees are not employed may, if requested by the Party of the First Part, be done by the projectionist at the regular overtime rate. However, projectionists will not be required to perform any work that properly comes under the jurisdiction of another craft.

16. When the mixing panel, or other method of control, for a public address system is installed in the projection room the regular crew will be permitted to turn this equipment on at the start of the stage performance, and turn it off at the end of the stage performance. If any adjustment or manipulation of the equipment is done during the stage performance an additional projectionist shall be employed and he shall receive \$4.14 per performance. Each separate time that the stage performance is presented shall be considered as one performance.

17. Any theatre, while using sound dummies, will employ an additional projectionist on each shift, projectionist shall receive regular projection room scale for that shift, and at the option of the Party of the First Part may be required to work full shift time. This section applies to regular performances and not to studio or press previews.

18. Any theatre, while using auditorium fader, will employ an additional projectionist on each shift, projectionist shall receive regular projection room scale for that shift, and at option of the Party of the First Part may be required to work full shift time. This section applies to regular performances and not to studio or press previews. [364]

19. One projectionist shall be on duty at the following times, and shall receive the overtime rate of pay: (1) During the original installation of projection or sound equipment or replacement thereof; or (2) the servicing of any projection or sound equipment; or (3) the testing thereof; or (4) screen illumination tests; or (5) the repair or installation of any apparatus or electrical appliance directly or indirectly used by the projectionists in connection with the presentation of the show. If the work is performed two hours or more prior to the starting time of the performance, there shall be a minimum charge of two hours' pay. If the work is performed after the close of the show, the projectionist shall be paid from the time the original shift ends until the work is completed. If the work is performed less than two hours prior to the starting time of the shift, the projectionist shall be paid for the time actually consumed.

20. It is understood that management shall have access to the projection booth at all times. The projectionist may be called at the direction and discretion of management. It Is Further Mutually Agreed that the projectionist assumes no responsibility for the condition of the booth or equipment when work has been done by other craftsmen during his absence.

21. The Employer agrees that the Business Manager of the Union, or his duly authorized representative, shall

have access to the premises of the theatre at all reasonable times without charge for the purposes of attending to such business of the Union as they may deem necessary either with the Employer or with any operator there employed.

22. The screening of one reel consisting of one subject not exceeding 2000 feet in length, in such theatres employing two or more projectionists per shift, shall require only one projectionist on duty, providing the screening is run before or after the performance and is not a part of the performance. If more than one reel or more than one subject is run on this screening, all projectionists on that shift must be on duty.

23. Except in cases of emergency, projectionists will not be required or permitted to perform those services customarily done by sound service engineers. An emergency sound repair will constitute a repair when the performance has actually been interrupted or might possibly be interrupted.

24. When performance time is not consumed in schedule, balance of time shall be used for any additional work necessary in the projection room, if requested by Party of the First Part.

25. It Is Mutually Agreed that the employment of projectionists shall be in conformity with the Seniority Laws of the Party of the Second Part.

26. Cloth towels, drinking water and soap shall be furnished by the theatre, one clean towel each day for each projectionist employed.

27. Studio Or Press Preview:

Theatres employing two men per shift—

Studio preview on composite print: Regular crew only.

Studio preview with separate sound track consisting of two reels or less: Regular crew only.

Studio preview with separate sound track consisting of more than two reels: Regular crew, and one extra projectionist.

When auditorium fader is used one extra projectionist is required to operate same.

Theatres employing one man per shift—

Studio previews on composite print: Regular projectionist and one extra projectionist.

Studio previews with separate sound track consisting of two reels or less: Regular projectionist and one extra projectionist.

Studio previews with separate sound track consisting of more than two reels: Regular projectionist and two extra projectionists.

When auditorium fader is used one extra projectionist is required to operate same. [365]

28. Extra projectionists called to work on Studio Previews shall receive \$13.80 for each preview. They will report for work at the beginning of the shift on which the preview is to be run and shall remain on duty until the preview has been run. However, if sound dummies are to be dismantled and are dismantled immediately after the preview, the extra projectionists will remain on duty until the dummies have been dismantled.

29. A projectionist will not be required to operate more than one spotlight.

A projectionist may operate one spotlight and one stereoptican providing both pieces of equipment can be operated from one station.

A projectionist may operate one spotlight and one flood-light providing both pieces of equipment can be operated from one station.

A projectionist may operate one spotlight and one effect machine providing both pieces of equipment can be operated from one station.

A projectionist may operate one stereoptican and one effect machine providing both pieces of equipment can be operated from one station.

30. Projectionists will not be required or permitted to furnish sound testing equipment or other equipment other than the necessary tools for projection work.

31. Projectionists will not be required or permitted to leave the projection room while on shift, except in case of dire emergency.

32. All installation of projection machines and equipment and repair of same shall be done by members of the Party of the Second Part when done in the jurisdiction of Local 150.

33. All work of any nature to be performed in the projection room before the start of the performance, shall be done by members of the opening shift in that theatre; likewise any such work to be done at the close of the performance shall be done by members of the closing shift. A member of either shift will be permitted to assist in the

performance of this work on the opposite shift, providing no member of that shift is displaced.

34. At any time that a theatre company wishes to transfer one of its projectionists from one theatre to another theatre operated by that company, the projectionist shall receive at least one week's notice in writing of such transfer. The transfer shall only be made with the mutual consent of the projectionist.

35. Any theatre making a change in policy, or change in hours of operation, shall give the projectionists one week's notice in writing of such change of policy or hours of operation when such change will reduce the projectionists' salary.

36. A. Chief Projectionists and Supervisors of Projection shall be members of the Party of the Second Part; and their appointment as Chief Projectionist, or Supervisor of Projection, must be confirmed in writing to the Party of the Second Part by the Party of the First Part; otherwise the appointment will not be recognized by the Party of the Second Part.

B. When there is a Chief Projectionist, or Supervisor of Projection, named by the Party of the First Part, all notices of termination of services of projectionists furnished by the Party of the Second Part shall be given in writing by said Chief Projectionist or Supervisor of Projection.

37. A. The Party of the First Part agrees that when desiring to dispense with the services of a projectionist furnished by the Party of the Second Part, he will give the projectionist two weeks' notice in writing, said notice to be considered as starting with the next payroll week or two weeks' salary in lieu thereof, except in case of drunkenness, dishonesty or incompetency, in which case notice will not be required. A projectionist may be considered incompetent when it is established that he is unable to perform his duties in the theatre wherein he is employed.
- B. Projectionists furnished by the Party of the Second Part who desire to leave the employment of the Party of the First Part will give the Party of the First Part two weeks' notice, said notice to be considered as starting with the next payroll week. The two weeks' notice referred to in this clause may be waived in writing with the mutual consent of both parties. [366]

38. The Party of the First Part further agrees that in the event he dispenses with the services of any projectionist hired under this agreement, or said projectionist leaves the employment of the Party of the First Part for any reason whatsoever, said Party of the First Part will

replace the employee leaving with another projectionist that is furnished by the Party of the Second Part.

39. Motion picture films and records shall be delivered to, and picked up from the projection room, by the Party of the First Part, or his agent, who is not a member of the Party of the Second Part.

40. Projectionists shall not be requested or required to perform any act that is in violation of the terms of this agreement, or the Constitution and By-Laws of the Party of the Second Part.

41. The Party of the First Part hereby agrees that before the opening date of any theatre hereafter acquired he will confer with the Party of the Second Part and enter into negotiation of scale for same.

42. It is further mutually agreed that the Party of the First Part will at all times during the life of this agreement employ only members of the present affiliated unions of Local 150, as such affiliates are presently constituted, in their proper departments.

43. It is further mutually agreed that inasmuch as the Party of the Second Part is a member of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, nothing in this agreement shall ever be construed as interfering with any obligation the Party of the Second Part owes to such International Alliance of Theatrical Stage Employees and Moving Picture Machine Opera-

tors of the United States and Canada, by reason of a prior obligation.

In Testimony Whereof, the parties hereto have set their hands and seals, and this agreement will be in force and binding from the 1st day of July, 1947, and shall continue in force and binding until the 30th day of June, 1949.

Frank Millan

Party of the First Part

Geo A. Schaffer

Business Manager

W. G. Crowley

President

Moving Picture Projection-
ists, Local No. 150, Interna-
tional Alliance of Theatrical
Stage Employees and Moving
Picture Machine Operators of
the United States and Canada.

Party of the Second Part.

(Seal)

[Endorsed]: Filed Feb. 26, 1948. Edmund L. Smith,
Clerk. [367]

In the District Court of the United States for the
Southern District of California

Civil Action No. 7282-BH

UNITED WEST COAST THEATRES CORPORA-
TION, et al.,

Plaintiffs,

vs.

SOUTH SIDE THEATRES, INC., et al.,

Defendants,

TWENTIETH CENTURY-FOX FILM CORPORA-
TION, et al.,

Third Party Defendants.

OBJECTIONS TO MOTION OF RECEIVER,
FRANK MILLAN

Now comes the defendants South Side Theatres, Inc., Marco Wolff, Fanchon Simon, Roy N. Wolff and Rube Wolff and file these their objections to the granting of the motion of the receiver, Frank Millan for an extension of time within which to file his final report. The objection to the granting of said motion is based on the grounds:

1. That during the continuance of the receivership, these defendants have never received any reports or accounts from the said receiver.
2. That defendants have not received any payments of rent for the building, all of which the defendants were entitled to under the provisions of the agreement which was made the basis of the action. [368]
3. That defendants have received no distribution of monies from the receiver during the continuance of said receivership, and all of the said monies have accumulated in the hands of the receiver.

4. That the receiver has had adequate time in which to file his accounting since the termination of the receivership, and that all the records necessary for the rendition of the account have been in the hands of the receiver during the continuance of the receivership and subsequent thereto.

Wherefore, these defendants request this Honorable Court to deny the motion of the receiver for an extension of time in which to file his final report and respectfully request this Court to order the receiver to file his final account forthwith.

MACFARLANE, SCHAEFER & HAUN

By William Gamble

Attorneys for Certain Defendants

Copies of these objections have been served by mail upon the following persons:

Newlin, Holley, Sandmeyer & Coleman, Attorneys for United West Coast Theatres Corporation, Twentieth Century-Fox and Charles P. Skouras.

Loeb & Loeb, as Attorneys for Loew's, Inc.

Mitchell, Silberberg & Knupp, as Attorneys for RKO-Radio Pictures, Inc. and Columbia Pictures Corp.

Freston & Files, as Attorneys for Warner Bros. Pictures, Inc.

O'Melveny & Myers, as Attorneys for Paramount Pictures, Inc.

O'Connor & O'Connor, 530 West Sixth Street, Los Angeles 14, California, as Attorneys for Receiver, Frank Millan.

WILLIAM GAMBLE

[Endorsed]: Filed Aug. 6, 1948. Edmund L. Smith, Clerk. [369]

[Title of District Court and Cause]

RECEIVER'S REPORT

Comes now Frank Millan Receiver, for the Alto Theatre and Building, and makes the following report:

Frank Millan was appointed Receiver to take charge of and operate the Alto Theatre Building and the Alto Theatre located at 8862 South Western Avenue in the City of Los Angeles, State of California; that pursuant to such Order he did take charge and operated said subjects. By further order of Court the receivership was ordered terminated effective June 30, 1948.

On July 1, 1947, the Alto Theatre Building was owned by South Side Theatres, Inc. The building contained the Alto Theatre and seven stores facing on Western Avenue. On July 1, 1947, the said stores in the building were rented from South Side Theatres, Inc., as follows:

The store at 8864 South Western Avenue was leased by Mrs. [370] L. L. Logan and Mrs. R. V. Clark for a period of two years, commencing April 1, 1947, and ending March 31, 1949;

The store at 8866 South Western Avenue was leased by Ralph M. Nutt for a period of two years, commencing February 1, 1947, and ending January 31, 1949;

The store at 8868 South Western Avenue was leased by Katherine Tinder for a sixteen-months' period, beginning January 1, 1947, and ending on April 30, 1948;

The store at 8870 South Western Avenue was leased by D. J. Eller and Frank A. Barso for a period of one year, commencing on the first day of February, 1948, and ending the 31st day of January, 1949;

The store at 8872 South Western Avenue was leased by Ray Bailey for a period of two years, commencing May 1, 1947, and ending April 30, 1949;

The store located at 8874 South Western Avenue was leased by Catherine E. Scheppers for a period of one year, commencing May 1, 1947, and ending April 30, 1948;

The store located at 8876 South Western Avenue was leased by Alexander Newfield and Alex Schrieber for a period of three years, commencing May 1, 1945, and ending on the 30th day of April, 1948.

During the course of the receivership, certain leases expired and in their place new ones were negotiated by the Receiver. They are as follows:

On April 30, 1948, a one-year lease was entered into by the Receiver with Katherine Tinder for the same store located at 8868 South Western Avenue;

On January 21, 1947, a new lease was entered into by the Receiver with D. J. Eller and Frank A. Barso for a period of one year for the store located at 8870 South Western [371] Avenue;

On the 15th day of April, 1948, a new lease was entered into with Catherine E. Scheppers for a period of one year for the store located at 8874 South Western Avenue;

On January 30, 1948, a new lease was executed with Harry Isenberg and Mayer Levenstein for the store located at 8876 South Western Avenue for a period of two years, which lease commenced on July 1, 1948.

No lease existed on July 1, 1947, nor was any thereafter made for the space occupied in the building by the Alto Theatre.

Copies of the existing leases and canceled leases are in the possession of the Receiver.

The Projectionists at the theatre are members of Moving Picture Projectionists Local No. 150 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada. During the course of the receivership and in February, 1948, a wage scale and working agreement was executed between the said Union and the Receiver for a modified wage scale agreement, and payments have been made pursuant to the said agreement. A copy of this agreement is attached to the Report, marked Exhibit 1, and made a part hereof.

On July 1, 1947, at the time the receivership commenced, all books and records and documents of account pertaining to the operation of the Theatre and the Building had been removed. There was no cash balance in the Bank; there was no operating account. All funds had been removed. All working data and schedules and information necessary for operation had been removed.

Operation of the Theatre was commenced on July 1, 1947. The sum of \$30.00 was borrowed from the Academy Theatre in Inglewood for operating expenses. Candy for the confectionery stand, tickets and stationery were borrowed from Fox West Coast Agency Corporation. A picture was in the projection room which had been paid for, which picture was used for three days. The \$30.00 was repaid the following day. [372]

On July 1, 1947, a bank account was opened at the Bank of America National Trust and Savings Association, Manchester and Vermont Branch, under the name of Frank Millan, Receiver for the Alto Theatre and Alto Theatre Building, with the arrangement that the checks were to be countersigned by the Fireman's Fund Indemnity Company.

All income received from the rentals of the stores and the operation of the Theatre was deposited in said bank account.

Accounts showing the receipts per month were maintained by the Receiver, which accounts show the gross amount received and deposited from the box office, the amount of admission tax deducted therefrom and the resulting box office net, which report shows, in addition, the overage or shortage on the monthly basis, the income from the sale of candy and confections in the Theatre and the income from leases referred to herein. Such statement also shows the monthly disbursements for advertising, repairs, supplies, miscellaneous expense, express and drayage charges, telephone and telegraph, confectionery expenses, licenses and taxes, film rentals and salaries. A daily itemized statement of such items for the twelve-month period is attached hereto and marked Exhibit 2 and made a part of this Report.

The total income received by the Receiver from the operations of the Theatre and the Building for the twelve-month period during which the receivership operated was \$175,024.57.

The total expenses for the same period from the operation were \$110,936.64 (including outstanding vouchers).

The present amount of cash on deposit at the said Bank on August 19, 1948, was \$63,949.34.

Prior to the appointment of the Receiver the Alto Theatre and Alto Theatre Building was managed pursuant to an agreement whereby the managing agency was paid 5¼% of the gross income received from the Alto Theatre and from the Alto Theatre Building for the necessary services in conducting and operating the theatre business and the management of the Building, such services being purchasing film, renting film, booking film for display, advertising present and future pictures, managing personnel, purchasing confectionery [373] supplies, purchasing necessary supplies for theatre operation and for the Building, maintenance of the theatre and Building, negotiation of leases for stores in the Building, maintaining adequate records of account showing receipts and disbursements, and such general services as are necessary for conducting and operating the business of a Theatre and a Building.

The sum of \$138.49, which amount represents the difference between income and expenses and the amount of money on deposit in the Bank, is in the form of checks which are now outstanding and which should be cleared before the end of the month of August, 1948.

During the period of the receivership, the Receiver has assumed and conducted the management service originally handled pursuant to the agreement in return for

the payment of $5\frac{1}{4}\%$ referred to above. No payment has been made to the Receiver as a receivership fee or for such management work.

During the course of the receivership, the Receiver has found it necessary to engage the services of an attorney and has engaged the services of O'Connor & O'Connor, at 530 West Sixth Street in the City of Los Angeles, California, which appointment was approved by Order of the Court. No payment has been made for attorneys' fees in connection with this receivership.

An additional amount of \$138.49 is in the form of outstanding vouchers which should clear the bank by the end of the month of August. Upon the clearing and accounting of this amount, the account of the receivership will be complete pending a petition for receiver's fees for administration and for attorneys' fees. The final accounting for the said amount of \$138.49 will be presented to the Court as soon after the first of September, 1948, as the vouchers are cleared and paid.

No income tax return either for the Federal Government or for the State Government has been prepared by the Receiver and no tax paid on income received from the operations of this receivership. Regulations 111, Section 29.52-2, in part, provides that a Receiver in charge of only a part of the property of a corporation need not make a return of income. It has been the Receiver's position that the property of the receivership is only a part of the property of one of the corporations having an interest in it, and that such [374] corporation has filed

and included in its return the income during the receivership. In the event that such income has not been included in the return of the corporation owning the interest in the receivership, it will be necessary for the Receiver to prepare and file an income tax return for the fiscal year in which the properties were operated by the receivership. Such return is due on September 15, 1948. In the event that the income of the receivership has not been included on the returns of the corporation owning the property, it will be necessary for the Receiver to pay such tax.

No rent has been paid during the course of the receivership for the space occupied by the Theatre, as the Receiver, being the Receiver for the Building, such rents would be payable to him.

Dated this 19th day of August, 1948.

FRANK MILLAN

Receiver

O'CONNOR & O'CONNOR

By Edward J. O'Connor

Attorneys for Frank Millan, Receiver [375]

* * * * *

[Affidavit of Service by Mail.]

[Endorsed]: Filed Aug. 20, 1948. Edmund L. Smith,
Clerk. [395]

[Title of District Court and Cause]

RECEIVER'S FINAL REPORT

Comes now Frank Millan, Receiver for the Alto Theatre and Alto Theatre Building and makes this, his Final Report for the operation of the Alto Theatre and Alto Theatre Building located at 8862 South Western Avenue in the City of Los Angeles, State of California. Pursuant to Order of Court dated July 1, 1947, the Receiver operated the said Theatre and operated the said Building for the period from July 1, 1947, to and including the 30th day of June, 1948. The said receivership was terminated by Order of Court on June 30, 1948.

On August 19, 1948, a report of receivership proceedings for the said properties was filed by this Receiver, which Report is referred to and included as part of this Report by reference. Some changes are made in Exhibit 2 of the said Report, which are specifically set forth herein. Except as modified by this, the Final Report, the earlier report of August 19, 1948, is to be [396] considered as part of this, the Final Report.

The total gross receipts during the said period were \$175,746.58.

The gross expenses during the said period were \$112,461.13.

The net profit is \$63,285.45.

The present bank balance is \$63,439.34.

The difference between the bank balance and net profit is \$153.89.

During the one-year period of operation by the Receiver, the net profit from the operation of the Theatre and Building was \$63,285.45.

There is a difference between the present bank balance and the net profit of \$153.89. This difference is made up of checks outstanding in the amount of \$126.42, plus a \$25.00 unaccounted for item on rental receipts. Included in this item is miscellaneous revenue acquired after the close of the receivership in the amount of \$203.53.

The sum of \$63,285.45 is available for distribution. It is requested that from this amount be withdrawn a reasonable Receiver's fee and reasonable Attorneys' fee.

The separate items comprising gross receipts are as follows:

Box Office deposits.....	\$151,188.83
Candy income	15,668.28
Miscellaneous income	414.47
	<hr/>
	\$175,746.58

The separate items comprising total expenses are as follows:

Advertising	2,325.26
Repairs	2,570.96
Supplies	1,679.57
Miscellaneous	450.66
Exp. and Dray. Expense.....	526.90
Tele. and Tel.	308.58
Other expenses	6,705.40
License	286.15
County tax	2,735.79
Film	34,008.51
	<hr/>

(Carried Forward) \$ 51,597.78 [397]

(Brought Forward)	\$ 51,597.78
L. H. P.....	1,705.53
Admission tax	23,386.25
Candy cost	9,468.53
Candy tax	307.87
Emp. taxes.....	2,105.74
Donations	50.00
Salaries	18,319.38
Expense after June 30.....	5,520.05
	<hr/>
Total.....	\$112,461.13

Since the filing of the First Report, certain reconciliation figures and adjustments are applied to Exhibit 2, which are as follows:

Sunday, July 6, 1947

Box Office Deposit—Change from \$403.05 to \$403.14

Saturday, July 19

Box Office Deposit—Change from \$614.94 to \$615.19

Thursday, July 24

Box Office Deposit—Change from \$211.83 to \$211.31

Total.....\$11,677.51 \$11,677.60

Wednesday, September 3, 1947

Box Office Deposit—Change from \$195.35 to \$193.35

Change Overage from 30 cents short to \$2.30 short

Box Office Deposit Total—Change from \$12,914.17
to \$12,912.17

Total Box Office Shortage—Change from \$6.78 to
\$8.78

Wednesday, October 1, 1947

Eliminate candy—\$32.00

Total candy deposit—Change from \$1,336.00 to
\$1,304.00

Repairs—Change from \$25.23 to \$45.31

Supplies—Change from \$109.74 to \$89.66

December 11

Change Candy—Insert \$100.00

Change Candy total from \$1,184.69 to \$1,284.69 [398]

Wednesday, December 31, 1947

Total Candy Deposit—Change from \$67.00 to \$32.69

Box Office Deposit Total—Change from \$1,096.00 to
\$1,084.69

December 15

Other Deposits: Insert \$100.00

Total should be \$826.10

Saturday, January, 1948

Candy Deposit—Change from \$125.00 to \$100.00

Eliminate \$100.00 deposit

Other Deposits—Change from \$925.00 to \$825.00

Total Candy Deposit—Change from \$1,556.00 to
\$1,531.00

April

Shortage—Change from \$753.00 to \$653.00

Miscellaneous Expenses—Change from \$43.36 to
\$58.80

May

Total Box Office Deposit—Change from \$14,570.71
to \$14,570.70

Other Expenses—Change from \$400.00 to \$500.00

Films—Change from \$2,721.00 to \$2,621.00

May 30, 1948

Total Box Office Deposit—Change from \$625.00 to
\$500.00

June 5, 1948

Candy Deposit—Change from \$82.00 to \$72.00

June 23, 1948

Other Deposit—Add \$67.00

Friday, June 25, 1948

Candy Deposit—Eliminate \$21.00

Saturday, June 26, 1948

Candy Deposit—Change from \$90.00 to \$40.00

Candy Deposit Total—Change from \$1,024.00 to
\$1,010.00

Advertising—Change from \$151.50 to \$151.05

The Alto Theatre and Alto Theatre Building have been turned over by the Receiver and are no longer in his possession, said properties at present being [399] occupied by South Side Theatres, Inc.

Prior to the date of the receivership, the said Theatre and Building were managed and operated for five and one-quarter per cent ($5\frac{1}{4}\%$) of the total box office gross, candy profit, subrentals and miscellaneous deposits, which for the present year total \$134,641.63. For the operation under said basis for said year the operation cost would be \$7,068.69. From the sum of \$7,068.69 regularly allowed for expense of operation, it is respectfully requested that the Receiver's fee be allowed in the amount of \$4,000.00 and that the Attorneys' fee be allowed in the amount of \$2,000.00.

Additional examination has been made by the attorney for the Receiver in cooperation with tax counsel for interested defendants. Upon a thorough examination of the applicable tax law, it is concluded that this Receiver should not file a tax return, for the reason that he is a Receiver

for only a part of the property of another entity, and as such is not required to file Federal or State income tax returns and, consequently, no income tax, either Federal or State, will be paid upon the said accumulated income. It is the Receiver's position that such income will constitute taxable income to the entity to which it belonged and to which this fund will be disbursed.

A copy of this Report is being forwarded to each one of the parties plaintiff and defendant, by giving a copy to their respective counsel. It is requested that a date be set within which to file any objections to the said Report and a further date for hearing on such objections, if any; that as soon thereafter as is satisfactory to the Court the Receiver's account be approved; that a Receiver's fee in the amount of \$4,000.00 and Attorneys' fee in the amount of \$2,000.00 be allowed and such amounts paid from the said sum of \$63,285.45; and that the balance be disbursed and the Receiver discharged.

No party plaintiff or defendant to this action would accept the return of the Theatre and Building on the termination of the receivership, and the Receiver is advised that no party will accept the income accumulated and referred to herein; and the Receiver requests that unless the claimant of such accumulated income be established or recognized, the said income be disbursed [400] by the Receiver to the Clerk of the Court.

Dated this 16th day of September, 1948.

FRANK MILLAN

O'CONNOR & O'CONNOR

Receiver

By Edward J. O'Connor

Attorneys for Frank Millan, Receiver [401]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Sep. 17, 1948. Edmund L. Smith, Clerk. [402]

[Title of District Court and Cause]

OBJECTIONS TO RECEIVER'S FINAL REPORT

Now Come the defendants South Side Theatres, Inc., Marco Wolff, Fanchon Simon, Roy N. Wolff and Rube Wolff, and file their objections to receiver's final report heretofore made by receiver pursuant to order of Court terminating said receivership.

The report of the receiver insofar as the items are specified has been audited by the defendants and is found to be in order except for the item of expense after June 30, 1948, which has not been itemized and from which it cannot be determined what expenditures were made to constitute the sum of \$5,520.05. A complete account showing the item of expenses totalling this sum should be submitted. There is also the item of petty cash in the approximate sum of \$100.00 which has not been accounted for and should be included [403] in the account.

Further objection is made to the report in that it does not include any receipts from the sale of popcorn from the popcorn machine located on the premises nor does it include any receipts received from the sale of soft drinks from the coca cola vending machine. Both of said vending machines were operated prior to the receivership and were taken over by the receiver as part of the property to be held and accounted for by him.

There is a further discrepancy in the sales from the candy concession in that the receiver has not accounted for 5% of the profits received from said concession. It

was determined from an audit of the records of the receiver that from the cost of the candy the receipts as shown were approximately 5% under the receipts which should have been accounted for by the receiver from the sale of the candy purchased.

All of the items hereinabove set forth which have not been accounted for were receipts from property which was under the control of the receiver and which was taken over by the receiver as part of the assets of the Alto Theatre and should be included in the account and the proceeds therefrom turned over to the distributee upon the termination of the receivership.

Defendants further object to the compensation requested to be allowed for the receiver. Subsequent to the appointment of the receiver there was allowed by the Court the sum of \$100.00 per week as compensation for the receiver which during the total year of operation would amount to \$5,200.00 which has been paid by the receiver and deducted in the account under expenses. There was further compensation to the receiver in the amount of \$400.00 as a Christmas bonus which was also deducted from the account. At the time of the appointment of the receiver he was operating the theatre as a manager and received compensation therefor in the sum of \$65.00 per week and other emoluments which brought the total to approximately \$100.00 per [404] week and it was upon this basis that the sum of \$100.00 per week was fixed by the Court to determine the compensation which would be just for the receiver during his operation. The services

performed by the receiver did not entail any further burden upon him other than those normally incident to the operation of the theatre and the compensation fixed by the Court amply provided for a just return for the services rendered by the receiver. There is no showing of unusual services rendered by the receiver which would warrant the additional payment to him of \$4,000.00 as compensation during the operation of the receivership.

Defendants further object to the item of \$2,000.00 as compensation for the attorney for the receiver. At the time the Court appointed the attorney for the receiver, he stated that it was the purpose of having available for the receiver competent legal advice. However, it was expressly understood that the attorneys fees were to be nominal. The attorneys for the receiver were appointed some time after the receiver's appointment and it is believed that the sum of \$2,000.00 as attorney's fees is excessive. These defendants further object to the payment by them of any attorney's fees for the receiver as the receiver was appointed at the request of the plaintiffs and served no useful or beneficial purpose to these defendants. Therefore, if any attorney's fees are allowed, it is submitted that the same should be paid by the plaintiffs procuring the appointment and not deducted from the receipts in the hands of the receiver available for distribution.

Wherefore, defendants pray that upon a hearing of these objections the Court order the receiver to account for the initial items specified in these objections and the Court deny the receiver additional compensation as set

forth in his report and further that the Court determine the amount of the compensation to be paid to the receiver's attorneys and that the same be fixed at a reasonable sum.

Dated: October 1, 1948. [405]

MACFARLANE, SCHAEFER & HAUN

By William Gamble

Attorneys for Defendants

Copies of these objections have been served by mail upon the following persons:

Newlin, Holley, Sandmeyer & Coleman, Attorneys for West Coast Theatres Corporation, Twentieth Century-Fox and Charles P. Skouras.

Loeb & Loeb, as Attorneys for Loew's Inc.

Mitchell, Silberberg & Knupp, as Attorneys for RKO-Radio Pictures, Inc. and Columbia Pictures Corp.

Freston & Files, as Attorneys for Warner Bros. Pictures, Inc.

O'Melveny & Myers, as Attorneys for Paramount Pictures, Inc.

O'Connor & O'Connor, 530 West Sixth Street, Los Angeles 14, California, as Attorneys for Receiver, Frank Millan.

WILLIAM GAMBLE

[Endorsed]: Filed Oct. 6, 1948. Edmund L. Smith, Clerk. [406]

[Title of District Court and Cause]

REPLY TO OBJECTIONS TO RECEIVER'S FINAL
REPORT

Comes Now the Receiver, Frank Millan, and in reply to request for additional information, contained in the Objections to Receiver's Final Report filed by South Side Theatres, Inc., Marco Wolff, Fanchon Simon, Roy N. Wolff, and Rube Wolff, through their attorneys, MacFarlane, Schaefer & Haun, and states that the material objected to is contained in the Final Report, but is more specifically enlarged upon herein.

I.

A detailed statement of the items of expenses paid after June 30, 1948, in the total sum of \$5,520.05 is as follows:

Payment of advertising costs incurred prior to June 30, 1948	\$ 52.83 [408]
Payment of film rental, incurred prior to June 30, 1948	1,389.31
Payment of repairs, incurred prior to June 30, 1948	35.38
Payment of express and drayage costs for film delivery and rubbish disposal, incurred prior to June 30, 1948	26.48
Miscellaneous expenses, including bank messenger, Electro Sun Photostats and O'Connor & O'Connor for photostatic copies used in reports and detective service, incurred prior to June 30, 1948	103.77

Salaries for services rendered in July for termination activities	\$ 450.00
Rebate on insurance to Fox West Coast for building insurance payments for insurance prior to June 30, 1948	180.81
Gas	3.23
May, 1948 Sales Tax	25.38
Candy purchased prior to June 30, 1948	348.14
June, 1948 Sales Tax	20.87 [409]
Candy concession City Tax for quarter ending June 30, 1948	13.39
June, 1948 Admission Tax	2,034.96
Withholding Tax for quarter ending June 30, 1948	425.25
Employees' Franchise Tax for quarter ending June 30, 1948	80.96
Social Security Tax (Unemployment) for period ending June 30, 1948	28.65
Social Security Tax (Old Age Benefits) for period ending June 30, 1948	149.79
Receivership bond premium, incurred prior to June 30, 1948	50.00
Supplies for projection room, secured before June 30, 1948	55.82
Telephone expense prior to June 30, 1948	45.03
Total	\$5,520.05

II.

Petty Cash (approximately)	\$ 100.00
----------------------------	-----------

The item above referred to, which was objected to in said objections, was deposited in the bank on July 15,

1948 and is listed as Miscellaneous Revenue in the Final Report. Deposit slips denoting such entry are in [410] the Receiver's records and available for examination.

III.

The objectors are in error in concluding that the receipts from popcorn and from the popcorn machine are not included in the receipts. Exhibit 2 of the Receiver's Report, listing the candy deposits, includes popcorn in the candy deposits as is the regular practice in the operation of this portion of the theatre business.

IV.

The objectors erred in concluding that the receipts from the sale of soft drinks from the Coca-Cola vending machine were not included. Such receipts were included under Miscellaneous Revenue. The bank slips designating deposits state such deposits are for Coca-Cola Revenue.

V.

The objectors erred in concluding that the Receiver has not accounted for 5% of the profits received from the candy concession. Prior to filing the Objections, Roy N. Wolff, one of the objectors, advised the Receiver that approximately 5% of the popcorn could be saved by not filling the 5 cents and 10 cents bags to normal capacity. The Receiver's statement of cost for the candy concession and revenue received is an accurate and complete statement of the profits realized from the candy concession.

VI.

In connection with the Receiver's fee and the attorneys' fee, it is pointed out that they total \$6,000.00, which is a low and reasonable expense for administration and management of the Theatre and building; that during the

normal operation of the Theatre and building the objectors, under their existing agreement, would pay \$7,-068.69 for such services; that the fee requested for services rendered by the Receiver and attorneys' fees is \$1,065.69 less than it was agreed to pay under the terms of the agreement for the operation of the Theatre and building.

VII.

All of the books, vouchers, bank deposit slips, bank statements and all records pertaining to the operation of the said Receivership are now in [411] the possession of the Receiver and are open for inspection and review to anyone having an interest in the said Receivership and the same will be made readily available.

It is respectfully requested that the account be approved as stated and that the Receiver's fees and attorneys' fees be considered reasonable and allowed as stated and that the specific items referred to in the Objections have been accurately accounted for.

Dated this 11th day of October, 1948 at Los Angeles, California.

FRANK MILLAN

Receiver

O'CONNOR & O'CONNOR

By Edward J. O'Connor

Attorneys for Frank Millan, Receiver [412]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Oct. 12, 1948. Edmund L. Smith, Clerk. [413]

In the District Court of the United States in and for the
Southern District of California

Central Division

Civil Action No. 7282-BH

UNITED WEST COAST THEATRES CORPORA-
TION, et al.,

Plaintiff

v.

SOUTH SIDE THEATRES, INC., et al.,

Defendants

TWENTIETH CENTURY-FOX FILM CORPORA-
TION, et al.,

Third Party Defendants

ORDER

This cause came on for hearing October 25, 1948, pursuant to notice duly served on all of the interested parties. There were present in Court Russell Hardy, appearing as counsel for South Side Theatres, Inc., Paul O. Sandmeyer and Frank R. Johnston, appearing as counsel for United West Coast Theatres Corporation, Edward J. O'Connor, appearing as counsel for Frank Millan, Receiver of the Alto Theatre and Alto Theatre Building, and the Court having heard the testimony and having examined the proofs offered by the respective parties and being fully advised in the premises, finds that the Receiver's Final Account accurately and correctly accounts for all moneys coming into his possession; that the Receiver has fully obeyed the orders of Court to him issued and has fully accounted for all moneys coming into his hands as [414] Receiver; that legal services have been rendered by the attorney for the said receivership; that the ownership of the net income is subject to dispute between the parties; that all of the receivership property, except the cash in the bank, has been deposited with the Clerk of this Court.

It Is, Therefore, Ordered that the Receiver's Final Account accounts for all of the money and disbursements during the course of the receivership and the same is hereby approved.

It Is Further Ordered that the sum of \$63,262.92 be deposited with the Clerk of this Court, less the sum allowed as a Receiver's fee, and as an Attorneys' fee, such order [TB] sum to be held by the Clerk pending further ~~audit~~ of the Court.

It Is Further Ordered that from the said sum be paid as Receiver's fee to the Receiver, Frank Millan, the amount of Two thousand (\$2000.00).

It Is Further Ordered that from the said sum be paid to the attorneys for the said Receiver, O'Connor and O'Connor, the sum of Two thousand (\$2000.00).

It Is Further Ordered that the Receiver be discharged from the said receivership and from all authority and liability in connection with the said receivership, and that he be forever discharged from any personal or other liability in connection with the said receivership.

It Is Further Ordered that the bond given and filed for faithful discharge of the Receiver's duties, which bond is in the amount of \$50,000.00, be and the same is hereby vacated, nullified and canceled.

Dated this 22 day of November, 1948.

BEN HARRISON

United States District Judge

Judgment entered Nov. 22, 1948. Docketed Nov. 22, 1948, J. Book 55, page 413. Edmund L. Smith, Clerk; by Theodore Hocke, Deputy.

[Endorsed]: Filed Nov. 22, 1948. Edmund L. Smith, Clerk. [415]

[Title of District Court and Cause]

NOTICE OF APPEAL

Notice Is Hereby Given that South Side Theatres, Inc. and Marco Wolff, Fanchon Simon, Roy N. Wolff and Rube Wolff, joint venturers, doing business under the name of South Side Associates, defendants above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the order approving the final account of the Receiver appointed in the above entitled matter and allowing Receiver's fees, Attorney's fees for the attorney for the Receiver, entered in this action on November 22, 1948.

Dated: December 16, 1948.

MACFARLANE, SCHAEFER & HAUN
HENRY SCHAEFER, JR.

WILLIAM P. GAMBLE

JAMES H. ARTHUR

By William Gamble

Attorneys for Defendants

RUSSELL HARDY

Of Counsel [416]

Parties to be served:

Newlin, Holley, Sandmeyer & Coleman, Attys. for
United West Coast, Twentieth Century-Fox and Skouras
601 West Fifth Street, Los Angeles

Loeb & Loeb, Attys. for Loew's, Inc., 523 West Sixth
Street, Los Angeles

Mitchell, Silberberg & Knupp, Attys. for RKO, and
Columbia Pictures, 727 West Seventh Street, Los An-
geles

Freston & Files, Attys. for Warner Bros., 650 South
Spring St., Los Angeles

O'Melveny & Myers, Attys. for Paramount, 433 South
Spring Street, Los Angeles

O'Connor & O'Connor, Attys. for Receiver, 530 West
Sixth Street, Los Angeles

Mailed copies Notice of Appeal 12-21-48

[Endorsed]: See list attached of parties to be served.
Filed Dec. 21, 1948. Edmund L. Smith, Clerk. [417]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States Dis-
trict Court for the Southern District of California, do
hereby certify that the foregoing pages numbered from 1
to 426, inclusive, contain the original Complaint for Dec-
laratory Relief; Order to Show Cause and Appointment
of Temporary Receiver; Return to Order to Show Cause
and Exhibits 1 to 12, thereto; Order to Show Cause filed
June 3, 1948; Order Allowing Temporary Receiver Interim
Compensation; Notice of Motion to Dismiss and to Sum-
mon the United States of America as a Party; Wage

Agreement Approval; Objections to Motion of Receiver, Frank Millan; Receiver's Report; Receiver's Final Report; Objections to Receiver's Final Report; Notice of Hearing on Objections to Receiver's Final Report; Reply to Objections to Receiver's Final Report; Order filed November 22, 1948; Notice of Appeal; Statement of Points on Which Appellants Intend to Rely on the Appeal; Appellant's Designation of Contents of Record on Appeal; Appellee's Designation of Further Records on Appeal and Appellees' Designation of Contents of Record on Appeal which, together with Reporter's Transcripts of Proceedings on July 7, 1947, September 10 and 12, 1947, January 26, October 25 and November 22, 1948, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$1.60 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 27 day of January, A. D. 1949.

(Seal)

EDMUND L. SMITH

Clerk

By Theodore Hocke

Chief Deputy

[Title of District Court and Cause]

Honorable Ben Harrison, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, Monday, July 7th, 1947

Appearances:

For the Plaintiffs: Messrs. Loeb & Loeb, by Benjamin F. Schwartz, Esquire.

For the Defendants: William Gamble, Esquire.

Los Angeles, California, Monday, July 7th, 1947

10:00 A. M.

The Court: You may call the calendar.

The Clerk: 7282, United West Coast Theatres and others versus South Side Theatres and others.

Mr. Gamble: The defendant is ready.

Mr. Schwartz: Plaintiff is ready.

Mr. Gamble: We request a continuance to, I think, August 4th.

The Court: The court will be dark all during the month of August, counsel.

Mr. Gamble: What would be the earliest date convenient to the court? Would it be in September?

The Court: It will be really the second Monday in September. Either the second Monday in September or July 28th.

Mr. Gamble: The reason for the request for a continuance is because eastern counsel has been handling this matter.

The Court: I am not questioning that, counsel.

Mr. Gamble: We would like to have time to try—Loeb & Loeb suggested we get together and perhaps it would be better for a September date.

The Court: Very well, it will be continued until September 8th. Do you consent to the interim receiver remaining in charge?

Mr. Gamble: Yes, pending the hearing on the order to show [2*] cause?

The Court: Yes.

Mr. Schwartz: Your Honor, there is a question came up concerning the propriety of the receiver here having counsel. We rather feel he should employ his own counsel if that is all right.

The Court: Counsel, I don't know the receiver, of course. I appointed a man that was manager because I figured that would reduce the expense. I am not trying to make any work for lawyers out of this. I am trying to hold the expense down. I put a receiver in because the place was not going to open that night and I felt that it was necessary to open. I do not see why until after September 8th, the receiver needs an attorney. I am not trying to make work for lawyers out of this.

Mr. Schwartz: I am sure, your Honor—

The Court: Your principal difficulty is over the decree and two pieces of property. That is the issue and your real problem and if the receiver needs an attorney to manage this theatre—do theatre managers ordinarily have attorneys to advise them?

Mr. Schwartz: No, except in this case there are certain matters that come up in which he might need legal advice and we do not feel we want to represent him too.

*Page number appearing in original Reporter's Transcript.

For example, there are such matters as licenses to be taken care of; his fees to [3] be set and determined and things of that sort.

The Court: He will continue to get his salary, will he not, as manager?

Mr. Schwartz: That is all subject to your Honor's approval. He is no longer manager now—he is the receiver.

The Court: That is true but he is acting in the capacity of manager.

Mr. Schwartz: That is true. I merely make the suggestion. The Court: The only thing is I want something left out of this proposition when it is over. I do not want the theatre to be broke. I would like to have something left. Now, if he needs an attorney for—

Mr. Schwartz: We are willing to handle any legal matter such as may come up from time to time for him.

The Court: Have you any objection to that?

Mr. Gamble: I have no objection except it seems to me actually there will be nothing coming up that he has not been able to handle in the past.

The Court: He has to be paid. He has to petition the court for allowance for his pay.

Mr. Gamble: At that time wouldn't the court be able to—

The Court: He cannot go until September 8th without money unless he is rich like lawyers. I will make an allowance for his regular salary. You prepare an order

for his regular salary that he has been receiving as manager which [4] will apply on the account and when the matter is over I will fix any additional fee as receiver that is proper, but I would like to hold the expense down.

Mr. Schwartz: We agree with your Honor on that point except we do not want to be placed in the position of representing the plaintiff and the receiver both.

The Court: If there are any matters that arise you and counsel should get together and discuss them as a matter of mutual interest.

Mr. Schwartz: I feel that can be done.

Mr. Gamble: That is fine.

The Court: Then you can charge the expense to your client. They have a lot of money.

(Whereupon the above proceedings were concluded).

[Endorsed]: Filed Jan. 27, 1949. Edmund L. Smith, Clerk. [5]

[Title of District Court and Cause]

Honorable Ben Harrison, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, Wednesday, September 10, 1947.

Appearances:

For the Plaintiffs: Loeb & Loeb, by Morris Pfaelzer, Esquire.

For the Defendants: MacFarlane, Schaefer & Haun, by Henry Schaefer, Jr., Esq.

Los Angeles, California, Wed., September 10, 1947
10:00 A. M.

The Court: You may call the case, Mr. Clerk.

The Clerk: United West Coast Theatres Corporation, et al. vs. South Side Theatres, et al., No. 7282-BH.

Mr. Pfaelzer: The plaintiff is ready.

Mr. Schaefer: The defendant is ready.

The Court: Gentlemen, with reference to the motion in the case of United West Coast Theatres Corporation, No. 7282, it is not going to be possible to reach that today. When I set the case I indicated it might go over.

Mr. Schwartz called me this morning with reference to it. As I understand, the case set for Friday is not going to be tried. I am quite sure that I can hear this matter at 10:00 o'clock Friday morning.

Mr. Pfaelzer: That is satisfactory, your Honor. That is quite satisfactory to us.

Mr. Schaefer: That is satisfactory to us, your Honor.

The Court: This matter will be continued until that time.

Mr. Schaefer: May I at this time, your Honor, move the admission of Mr. Russell Hardy of Washington, D. C., a member of the bar of Washington, D. C. and the Supreme Court of the United States, for the purpose of this case only.

The Court: You may take your order. [2]

There is one question that I would like to have both sides prepare themselves to argue. I am referring to the motion to dismiss and the motion for the United States to be summoned as a party.

After studying the pleadings and the agreement there arose in the court's mind a very serious question as to whether this court has any jurisdiction due to the fact that it involves two California corporations that are attempting to terminate a joint venture agreement by reason of this New York decree, but that is one of the contingencies in the agreement. That is, if the Attorney General or some decree, either consent or otherwise, terminates it. But there is a very serious question in the court's mind whether when you boil this case down if it isn't an action to terminate a joint venture by reason of the agreement between the parties.

If that is true then this court has no jurisdiction whatsoever and I would like to have counsel be prepared to argue that joint.

It has not been directly raised as yet but if I haven't jurisdiction I haven't, and that is all.

Mr. Pfaelzer: Of course, we believe you have. There is a Federal question involved.

The Court: I realize the plaintiff has proceeded on the theory that this involves the Anti-Trust Act and being a statute of the United States it involves the law of the [3] United States, but it seems to me that it is a pretty

close question of whether that isn't incidental to the joint venture and one of the contingencies upon which the joint venture can be terminated.

If that is true it may be that this court hasn't any jurisdiction and you will have to start your action over again in the state court. I think counsel should be prepared to argue that feature of the case.

Mr. Pfaelzer: We have cited no authorities on that proposition.

The Court: I realize that.

Mr. Pfaelzer: So we ask leave to file further authorities.

The Court: I am giving both of you gentlemen an opportunity to present anything that you want to either in the way of authorities or in the way of argument. Of course I prefer something that I can read rather than listen to an argument, but the time is short. I have spent considerable time on that phase of the matter myself and if the court hasn't jurisdiction then you people are going to have to get together to the extent, at least, that this theatre will not be closed.

Mr. Pfaelzer: I would like to see—

The Court: I can say some arrangement should be made for the continuance of this theatre, if this court hasn't [4] jurisdiction, either by filing another action in the state court under your agreement of termination.

You gentlemen may have all the answers and I may be entirely wrong in giving any consideration to that angle but I have almost convinced myself already to the effect that I haven't jurisdiction, so somebody is going to have to convince me that I do have jurisdiction of the action. If I haven't jurisdiction then you gentlemen are going to

have to get together and arrange for the continuance of this theatre because it would be a shame to have a business wrecked. You can do it either by mutual agreement or by filing a new action in the state court and ask for the appointment of a receiver in that jurisdiction.

I am just making those comments at this time so you will be advised as to what the court has in mind. I am not making any ruling but giving you some of the things that the court has been thinking about so you may be prepared to meet them.

Mr. Schaefer: Very well, your Honor. At 10:00 o'clock Friday, your Honor?

The Court: Yes. [5]

* * * * *

Appearances:

For the Plaintiff: Loeb & Loeb, by Benjamin F. Schwartz, Esq., and Morris Pfaelzer, Esq.

For the Defendants: MacFarlane, Schaefer & Haun, and Henry Gamble, Esq., by Russell Hardy, Esq. and Henry Schaefer, Jr., Esq.

Los Angeles, California, Friday, Sept. 12, 1947
10:00 A. M.

The Court: Call the case, Mr. Clerk.

The Clerk: Case No. 7282-BH, United West Coast Theatres Corporation and others, versus South Side Theatres, et al.

Mr. Schwartz: Ready for the plaintiff, your Honor.

Mr. Schaefer: The defendants are ready.

The Court: Gentlemen, I want to first hear discussion on the question of whether this court has any jurisdiction in this case.

Mr. Schwartz: I understood, your Honor, that the last time the attorneys were before the court it wanted to hear the plaintiff on that question, namely, the jurisdiction of this court.

I should like to state first, that I understand we are talking now about the jurisdiction of the court and not about the venue, and I would like to address my remarks to the court only on that point, namely, whether this court has jurisdiction and not whether the case should have been brought in New York or anywhere else.

The Court: The point I have in mind is whether this case should not have been brought in a state court rather than a federal court.

Mr. Schwartz: That is right. That is what I shall address myself to.

Mr. Hardy: If your Honor please, we are the moving parties in this motion.

The Court: Yes, but you have not raised the question of jurisdiction of the court.

Mr. Hardy: Yes, we have.

The Court: I do not so understand your motion. You raised the question of jurisdiction on the ground the New York court was the court they should apply to.

Mr. Hardy: We raised this question or we make that contention, that the New York court has exclusive jurisdiction of this subject matter and certainly of some of these parties.

That would mean, of course, that the State court has no jurisdiction. That is the holding of the cases upon which we shall rely.

The rule is that a court which first procures jurisdiction has exclusive jurisdiction and that means to the exclusion of all other courts—all other course of co-ordinate jurisdiction.

The Court: I understand your point in that respect but I am beginning at the very foundation. Whether the New York court, because it has assumed jurisdiction and is the first court in point of time to do that, has exclusive jurisdiction is one of the issues presented here. But we have a situation here where it appears to this court, as indicated the other day, this court has no jurisdiction whether there [4] had been an action filed in New York or not.

In other words, here are two California corporations quarreling over the dissolution of a joint venture agreement. That being true, there is a question in my mind as to whether I can do anything at all. In other words, whether I should not dismiss this case for want of jurisdiction and then the plaintiff could either file in New York or the State court, or in Arkansas or any other place.

That is the question I am primarily interested in.

Mr. Hardy: They base their—their—there are two reasons why this court does not have jurisdiction.

In the absence of this decree the jurisdiction would probably be in the State court. It would not be here. With the decree applying to this subject matter then the jurisdiction is exclusively in the District Court for the Southern District of New York, or, rather, in the Supreme Court of the United States because this case is on appeal. This very decree upon which they base their action, to justify their action, is on appeal in the Supreme Court at their instance on an assignment of error which will pull this decree up by the roots.

The Court: Those copies only reached me this morning and I haven't had an opportunity to go into that matter. However, I have given the question of the jurisdiction of this court a great deal of thought, irrespective and notwithstanding [5] standing the fact that another Federal court has assumed jurisdiction of the parent corporation—one of the corporations in this case. In other words, it is one of those cases that appears to me from a reading of the complaint, that I just haven't any jurisdiction over regardless of whether there is a decree in New York or not.

Mr. Hardy: That is all your Honor need to decide.

The Court: That is all I need to decide and if I do so decide then I do not have to cross the other bridges.

Mr. Hardy: Now, what I rose to mention in the beginning was, who do you desire to open this case?

The Court: Well, I have raised the question because I told counsel the other day I felt I didn't have jurisdiction and asked the plaintiff to justify the jurisdiction in this court, and also to hear the points raised by you by your motions, but I think plaintiff's counsel is probably responding to that request.

Mr. Hardy: Then I shall not try to disturb your Honor's present position.

The Court: I wondered if you were trying to talk me out of a position that might be advantageous to you. It is a rather common occurrence for those things to happen so I wasn't surprised.

Mr. Hardy: No, indeed, your Honor.

The Court: You may proceed, Mr. Schwartz. [6]

Mr. Schwartz: I think there is more to Mr. Hardy's position than meets the eye. I think he is seriously concerned with the question of venue here rather than jurisdiction.

The question which your Honor raises, and properly so, is whether this court or any district court of the United States has jurisdiction.

The Court: I am only interested in this District Court.

Mr. Schwartz: When we get through with this District Court then we can go into the venue, but now your Honor wants an argument on the question of whether this court has jurisdiction.

There is no question as to diversity of citizenship. It is only a question of—in our complaint we state the matter involves a Federal question. I think your Honor has the facts in mind but it might be well to touch upon them for a moment.

The Court: I am familiar with it. I do not want to prevent counsel from having his say but I do want you to know what I have in mind.

In the first place, you have brought this action for the purpose of terminating a joint venture agreement. You have pleaded the joint venture agreement and the circumstances under which that agreement can be terminated. You in substance, allege that under the decree of the New York court that a decree has been made and that it comes within the [7] provisions of the joint venture agreement.

You stated to me when you presented this ex parte that you did not know whether you were going to be held in contempt of that decree or not and that you didn't know where you stood and you wanted a determination of that question. But now you have alleged this joint venture agreement that sets forth a recognition in a sense, that perhaps the joint venture agreement might be subject to adverse ruling by the Federal court under the Anti-trust Act.

Mr. Schwartz: That is correct, sir.

The Court: And upon the happening of such a contingency the agreement was to terminate. And then turn to your prayer. What do you ask?

First, you ask that the venture agreement be declared terminated and have no further force or effect.

Second, that it be decreed that the plaintiffs are no longer bound to perform the venture agreement or any part thereof; that the court declare such other rights or duties as may be necessary. And then you ask for a receiver, an order to show cause.

Really what you are asking for in this case is covered by one and two, that the agreement be terminated. Isn't that correct?

Mr. Schwartz: But not for the reason for which your Honor apparently has in mind. In other words, we say here [8] that this agreement may be illegal under the Sherman Act. The reference to the Paramount case decree is merely for the purpose of stating to this court that the plaintiffs are under the jurisdiction of that court—not the defendants, but the plaintiffs. That the court in New York has stated in effect that pooling agreements are illegal. That the plaintiffs in this case have engaged in effective pooling agreements and furthermore, that these plaintiffs shall cease and desist after July of 1947 from further carrying out any such illegal agreement.

The Court: But counsel, what are you seeking from this court? You are seeking a termination of that agreement, of the agreement between the two California corporations. That is what you are seeking.

Mr. Schwartz: Or in the alternative this court could say, if it so found—

The Court: And I either find for the plaintiff or defendant if I determine that question.

Mr. Schwartz: That is correct.

The Court: But after all it is a question of whether or not the contingency has occurred that terminates the joint venture agreement.

Mr. Schwartz: No, sir, that is not our position your Honor. That happens to be an incident in this case. We are not asking this court to say this termination agreement [9] is—what we are asking you to decide—we are asking your Honor to study the joint venture agreement in the light of the Sherman Act and not in the light of the decree, and certainly not as far as the termination agreement itself is concerned. That we know is a State matter. But the courts have held, and I am sure your Honor is familiar with the rulings, that if you do have jurisdiction then you may decide incidental matters for a complete disposition of the case.

Our contention in this court, your Honor, and I hope I can make it clear, is that we are asking you to find that this joint venture agreement under the Sherman Act, is illegal.

We cite the case in our complaint because it is perfectly proper, the Paramount decree, as authority for holding that this joint venture agreement in this lawsuit is illegal.

Now, if your Honor holds that then it must follow that the termination of this contract should be ordered because we are under compulsion as plaintiffs—that is plaintiffs in this case but defendants in New York, not to engage in further activities in regard to this type of agreement.

Now, that is the issue and that I submit to your Honor, is a Federal question because your Honor is going to [10] have to determine whether or not the Sherman Act applies to this venture agreement.

Now, it might be that your Honor would say it doesn't and—

The Court: The joint venture agreement also recognizes the Cartwright Act.

Mr. Schwartz: Certainly if your Honor found there was no interstate commerce in this case you could—in other words, what we want your Honor to do in this case is terminate this agreement without liability. We want the court to say that you can terminate this agreement without liability to the defendants. That is why we are in here on an action for declaratory relief.

I would like to say—for example I would like to cite the case of Rambusch vs. Brotherhood of Painters, Decorators and Paperhangers of America, 105 Fed. (2d) 134. This case comes out of the Second Circuit. Of course, the facts are not on all fours here but they are similar enough to warrant this conclusion by the court.

After going into the question the court said:

“The petition for a declaration of illegality of a contract under the Anti-Trust laws and of unlawful restraint of interstate trade by the defendants does, however, present a Federal question adequate to give the district court jurisdiction.” [11]

That is our position here.

On the following page we find this language by the court:

“We shall consider both these points, having in mind, however, that we cannot interfere with the contract the parties have made unless it is one which is in definite violation of law, and that we ought not to do indirectly by contract construction what we are thus prevented from doing directly.”

We are not asking this court to construe the termination agreement. That is properly a matter for the State court. What we are asking this court to do is determine the legality or illegality under one of the laws of the United States, of this joint venture agreement which brought about this situation.

I don't go into the facts here because I think your Honor is familiar with how this joint venture agreement came into being.

I would like to cite the case of *Young & Jones vs. Hiawatha Gin & Manufacturing Company*, 17 Fed. (2d) 193. This is a district court case out of Mississippi.

In that case the court said:

"If such an inspection reveals a clear and substantial suit or controversy over the validity, construction, or effect of a law regulating commerce, [12] which will be defeated or sustained, according to the construction given such law, then it may be fairly said that the suits arise under a law regulating commerce."

And the court took jurisdiction.

In the case of *Smith vs. Kansas City Title Company*, 255 U. S. 180, at page 199, the court said:

"The general rule is that, where it appears from the bill or statement of the plaintiff that the right to relief depends upon the construction or application of the constitution or laws of the United States, and that such Federal claim is not merely colorable, and rests upon a reasonable foundation, the district court has jurisdiction under this provision."

And to the same effect we find in *Carter vs. Bramlett*, in 51 Fed. Supp. 547, *The First National Bank vs. Williams*, a Supreme Court case, reported at 252 U. S. 504, wherein the Supreme Court said:

“What constitutes a cause arising ‘under’ the laws of the United States has been often pointed out by this court. One does so arise where an appropriate statement by the plaintiff, unaided by any anticipation or avoidance of defenses, discloses that it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of an Act of Congress. If the plaintiff thus asserts [13] a right which will be sustained by one construction of the law, or defeated by another, the case is one arising under that law.”

That is my position, your Honor, on the question of jurisdiction of this court. And I should like to ask the court if I may at this time, simply for the purpose of keeping myself straight on this thing, if the court would ask counsel for the defendants to limit his argument to this question.

Mr. Hardy: If the court please, if it were not for the decree of the New York court this case would not be here or in any other court. What this case is about and what it is necessarily about, and what this court will have to consider to decide it, is what does this decree mean? Does it apply to this transaction?

The Court: Counsel has presented his authorities solely on the question of jurisdiction, forgetting about the New York decree. What is your position in that respect?

Mr. Hardy: It would probably be in the State court in the absence of this decree. I think in the absence of this decree, of course, it would state no cause of action in any court. [14]

* * * * *

Mr. Schwartz: Well, your Honor is going to have here a factual situation to determine that.

The Court: No, I am not.

Mr. Schwartz: I don't think your Honor wants me to reply to why we didn't go to the Supreme Court because I don't think that is the question here any more than they would want to state to this court why they don't want to take the theatre and operate it. It is theirs.

And while I am on that subject, your Honor, I would like to state right here and now that we have tendered this theatre to these people. The title is in them and we now here in open court and on the record again tender it for their operation.

The Court: Counsel, after studying this I am satisfied this court has no jurisdiction. I think the lack of jurisdiction can be sustained, first, as reflected by your complaint—no diversity of citizenship, and, secondly, that the New York court has assumed jurisdiction.

The problem that is concerning me is if there cannot be some arrangement made for the operation of this theatre without closing it down, resulting in a loss, there should be some way to avoid that. For instance, if it is [21] closed down and if you are eventually wrong in this matter, you would be liable for damages. On the other hand, if you eventually prove you are right you would still be damaged. Some arrangement should be made by

agreement between the parties or some other step taken, for the continuation of this theatre.

I have understood from counsel that there is no complaint as to the manner in which the former manager is operating the theatre. The former manager is acting as receiver in the case but is receiving for those services nothing more than his salary as manager. Nobody has been hurt because of that. Is that correct, counsel?

Mr. Schaefer: I don't believe I went quite as far as that, your Honor. I think it was stated that it was satisfactory that the present manager continue but there was no statement made as to anyone being hurt or any damage resulting.

I don't think we went into that point of the question. It was merely that we were satisfied that this manager carry on.

The Court: There was an order, I believe by stipulation, that he be paid his regular salary.

Mr. Schaefer: That is correct.

The Court: The theatre has been in operation as I understand it and is going along the same as before except [22] it has been under this manager, nominally under the direction of the court, but as a matter of fact proceeding and operating as before.

Mr. Schwartz: That is true.

The Court: That has been my understanding. If I have no jurisdiction then the receivership is terminated. There should be some arrangement made for the continued operation of this theatre so as to preclude unnecessary damages that might arise to either party.

Mr. Hardy: If your Honor please, may I say this? The decree simply said that they shall cease to perform

a certain kind of contract. Probably up to this moment they haven't done that. I think we shall take such action as will prevent unnecessary loss to us when they comply with the decree. They can walk away from the theatre. I think that is all, in a word, that the decree requires them to do.

The Court: That is what we have been trying to prevent. If this theatre is closed down it will cause damage to all parties.

Mr. Hardy: They are trying to go further than that. They are trying to force us into a position about that theatre.

Mr. Schwartz: We are not trying to force them into any kind of position. I think we have always been fair and open about the whole thing. [23]

Mr. Hardy: Well, I don't know. One may be forced by fair and open action. We are not required to operate that theatre. The decree doesn't say we shall operate the theatre or anybody shall.

The Court: But if the effect of that decree is to terminate the agreement then you can do as you please with it, can you not?

Mr. Hardy: Yes.

The Court: That is the effect of it.

Mr. Hardy: Yes.

The Court: The agreement is terminated.

Mr. Hardy: Yes.

The Court: And then the theatre is closed down and somebody has suffered a loss.

I am talking about this not from a legal point of view but from a practical point of view, from a common sense point of view. Some arrangement should be made for the operation of this theatre until this litigation is completed.

Mr. Hardy: Well, of course, we will make arrangements to prevent unnecessary loss. I do not mean to say that we will make any arrangements with these parties. Their arrangements have gotten them afoul of the Anti-Trust law.

Mr. Schwartz: I resent that kind of statement, if your Honor please. There is a record being made here and I resent that kind of imputation, that we have "gone afoul" by our [24] actions. That is Mr. Hardy's summation.

The Court: Well, counsel, this court has practiced law sufficiently long and sat on the bench long enough so that these imputations and comments of counsel mean very little. I have made lots of them myself when I practiced law. That was over a period of about 25 years. I have accused opposing counsel of everything and I understand quite well what is going on. I do not take it too seriously. Whether or not they have under this agreement run afoul of the Anti-Trust law I am not passing on and that is immaterial to the point that I am making.

I am going to sign an order that so far as this court is concerned, will terminate the receivership. Now what I want is not a legal problem. It is a business problem whereby some arrangement be made that will continue the operation of this theatre—to see that some night it isn't closed down. That isn't a legal problem but there is a practical problem confronting all of us. Suppose this agreement is terminated and the theatre is closed. If that is so the plaintiff has a right to walk away and leave the theatre. Now, if he is right in that respect and does walk away and leaves the theatre and the defendant says, "Well, he didn't have a right to do that" and then they find out that he did have such a right, nevertheless there is a loss,

and what I am trying to do by my comments is to see if there isn't some [25] plan whereby counsel can come to for the continued operation of this theatre by somebody or a third party. I do not care who it is. I am interested in preventing any further losses because of this litigation either here or in New York.

Mr. Hardy: If your Honor please, the problem of operating this theatre involves things that do not appear on the surface here. Now, this company is required to discontinue the performance of this venture agreement. As they interpret it I suppose all they need to do is lock the door of the theatre and walk away and say "There it is."

Now, the operation of the theatre isn't just the position of bricks and mortar. They have contractual rights appertaining to the operation of that theatre. The New York decree probably meant that they were to divest themselves of those rights and leave them with the theatre when they left. That has not been done.

The New York case is based upon allegations which have been proved and adjudicated in that court—

The Court: Which are not final.

Mr. Hardy: Which are not final. That those defendants enjoyed certain special privileges and priorities and discriminations with regard to the procurement of film and with regard to the run and clearance and all of the other important incidents of the operation of an exhibition business. For the operation of the Alto Theatre they enjoyed all of [26] those things.

Now, they do not give them up. They certainly have not said a single solitary word about taking those things and delivering them with the Alto Theatre. That decree did not intend that they should deliver bricks and mortar.

It intended they should deliver that with a business, a running business, so that anybody who should undertake to operate that theatre after these gentlemen shall leave it will be confronted with that situation and I say that he will be confronted with a situation described in the Government's case. He will discover that there is a Chinese wall that he will find very difficult if not impossible, to surmount.

Now, what this gentleman has said—he seemed to have been personally offended because I made a statement of fact about his clients violating the Anti-Trust laws. They have violated the Anti-Trust laws. It is adjudicated in a decree upon which he relies and which he brought into this court.

I meant no personal offense to him as he must have known, but it certainly is true that on the record that he has made in this court his clients have violated the Anti-Trust laws. But to come back to this theatre—

Mr. Schwartz: May I interrupt at this point, your Honor, to ask Mr. Hardy what they want? [27]

The Court: Just a moment. I will give you an opportunity to answer.

Mr. Hardy: What we want and what we think his clients ought to have done to really comply with the New York decree—he has asked what we want. We want the Alto Theatre and we want our Fifth Avenue Theatre.

Mr. Schwartz: That is not before this court. We are talking about the receivership and your Honor is being very decent about the thing in suggesting, apart from the legal points, what are we going to do about operating the receivership, terminating the receivership—purely from a business standpoint what are we going to do about the theatre.

The Court: Counsel, let me say this: I am going to take this matter under submission and if you gentlemen do not agree or do not make an honest effort to keep this theatre open I may hear this matter on its merits and let a receiver stay in there until the Supreme Court passes upon it and we have a ruling and thereby retaining jurisdiction.

I am giving you gentlemen an opportunity to get together around a table and work out a decent, fair method to prevent the accumulation of unnecessary damages. If counsel are not willing to do that they are not entitled to any courtesies from this court or any aid.

Mr. Hardy: Your Honor may depend upon it that we are going to do everything possible to avoid unnecessary damages. [28]

The Court: That is good talk, but I want you to get down together around the table and do it. If I should dismiss this action this afternoon that theatre would close tonight. There would be no means of operating it.

Mr. Hardy: It may be impossible to operate that theatre unless the person who does operate it gets the contractual rights it has now.

The Court: This has the appearance to me of trying to build up another lawsuit or damages and this court is not inclined to encourage that situation. There should be until this litigation is completed, whether they are going to bring any other action or whether they want to appeal from my ruling, some arrangement for the continuation of this theatre.

Mr. Hardy: If your Honor please, if they do what the decree required them to do, to discontinue the performance of that contract and walk away from the theatre, so to speak, I think we shall do everything possible

to resume possession and operate the theatre, but we may have at once a problem. They have not given nor indicated that they should have for the operation of that theatre, the contractual rights with regard to films and all the other things that they have procured for it—the preferential rights which only they have been able to enjoy. But we may operate it without that. If we do that is one of the factors. [29]

The Court: Can arrangements be made so that they get the benefits of the films that have been contracted for?

Mr. Schwartz: I would think so, your Honor, sure.

Mr. Hardy: We should have all the records they have got with regard to the operation of that theatre, all of the contracts, the written contracts. The right to examine them if they appertain to both theatres.

The Court: Gentlemen, I am going to take this case under submission and will rule on it after the Supreme Court has finished with the New York decree unless you people can get together.

I can see very clearly, Mr. Hardy, that you are not of the attitude to cooperate with this court in a matter the court thinks is important to both parties to prevent loss.

Mr. Hardy: We want to operate the theatre if they lose it.

The Court: And the court feels there should be some cooperation. I would like to see you gentlemen sit down around a table and see what can be done about turning over this property, as an interim proposition, until this litigation is settled, for the operation of this theatre, and enter into stipulations that neither side will be prejudiced by what you do. There is some way this can be worked out without the danger of closing this theatre. [30]

Mr. Hardy: We are disposed to operate the theatre.

The Court: Are you ready to take it over tonight?

Mr. Hardy: If they leave it, but here is the fear and difficulty we have with regard to conferring with them and making some arrangement for the continuance of it. We will get ourselves involved in this Anti-Trust action.

The Court: You are not a party to it?

Mr. Hardy: No, we are not a party to it but if we make deals with them with regard to the operation of that theatre, if we make some contractual arrangement or some verbal or other kind of agreement with them we may run afoul of that ourselves. We do not know what the Government officers will think about that.

I think you may depend upon it that if they do what they are required to do under the decree—

The Court: Well, you don't know what the decree will require of them.

Mr. Hardy: Turn the theatre over to us, walk away from it, I think we will operate it to the best of our ability, but we do not want to operate that theatre—

The Court: One minute you say you are afraid to take the contracts because you will be contaminated by it and the next minute you say when they offer the contracts to you you will operate the theatre.

Mr. Hardy: No, I make a distinction, your Honor. [31]

The Court: You are making the same kind of distinction that Mr. Schwartz made a little while ago on the question of jurisdiction.

Mr. Hardy: Well, I want to be cooperative. We want to be cooperative. We do not want to see the theatre closed because I think, as your Honor indicated, there is a rule of law with regard to damages that might operate adversely to us. If there is any situation in which we can protect ourselves from damage and we don't take

that opportunity then we cannot collect the damages. We don't want the theatre closed. We have no desire to have it closed simply to get damages. It is our theatre and we want it to be a going business, a going enterprise, but we do not want to make any arrangement with these parties with regard to what shall be done—what we shall do with the theatre. We think if they do what the decree provided there will be no problem at all with regard to operating that theatre. We will operate it somehow but we want them to do what the decree provided and required them to do and then we will take some action. We will step into the situation and operate the theatre.

I think we ought to have the contractual rights which appertain to that theatre during their operation of it.

The Court: A moment ago I understood you were afraid of them.

Mr. Hardy: No, what I am afraid of is making some deal [32] with the other party to this venture about the future operation of the theatre.

The Court: But you could enter into an interim agreement depending upon the outcome of this litigation.

Mr. Hardy: I will make a statement to your Honor. If they comply with that decree and go away from that theatre we will operate it and you may depend upon it, but we do not want to agree with them that we will do it.

The Court: Mr. Schwartz, what would preclude you from applying to Judge Hand under a petition for an order permitting this contract to stand in status quo until it has finally been terminated?

Mr. Schwartz: I don't know, your Honor. I haven't given any thought to it because I was firmly of the opinion that the parties being here, the subject matter being here, that your Honor would keep jurisdiction. But it did occur to me that your Honor might very well withhold further action until the Supreme Court has ruled on this.

The Court: I do not want to continue the receivership out there but on the other hand, I am not going to turn this theatre loose for the wolves either, and see it closed down. One moment counsel states that if you walk away he will run the theatre—

Mr. Schwartz: I don't know what he is going to do.

The Court: That is what he says here in court and then [33] the next minute he says he cannot run it unless he has certain preferential rights and contracts that you have concerning the films, but he is afraid to talk to you about that, he is afraid he might be contaminated.

Mr. Schwartz: What bothers me most is his interpretation of what we have to do to comply with the decree.

The Court: Why not get an order from that court? That court retains jurisdiction and can make further orders in the matter. If I discharge the receiver there will be a shut-down of the theatre and if you are not justified in permitting the theatre to shut down it might subject your client to damages. That is what I am trying to prevent.

Mr. Schwartz: I appreciate that.

The Court: I am going to take the matter under submission and if counsel cannot work something out I will have to rule on it.

The attorneys in the case should certainly be able to get together and talk this matter over. I don't know whether your clients have any personal feelings in the matter or whether it is simply a cold-blooded business proposition, but as far as the lawyers are concerned they should be able to discuss the matter fully. I do not believe either side would be in contempt of court if counsel conferred under the direction and order of this court, to arrange for the operation of this theatre until the status of the theatre can be [34] determined.

Mr. Schwartz: I agree with you.

The Court: And if you cannot do that then I think, Mr. Schwartz, you should determine what approach you wish to make. An appeal here is not going to do you any good because you are not going to have a receiver.

Mr. Schwartz: Well, I am perfectly willing to get together with Mr. Hardy and see if we can work it out.

The Court: It would seem to me the court in New York would permit the so-called joint venture agreement to continue until that litigation has been terminated.

Mr. Schwartz: I want to state to the court we are willing to turn the theatre over to them with the film contracts and everything that goes with it—personnel, whatever else it takes to run that theatre, but I would like to say this, your Honor, and I can appreciate the fact that this court would not like to keep a receiver there as such, but when you examine the thing, as your Honor knows, the receiver is the manager and he is getting the manager's salary as his receivership fee and I don't think there would be any great harm done if your Honor should decide to

keep him in there and see what happens with the Supreme Court litigation. But I think we should follow your Honor's suggestion and see what we can do—if we can get together and if we can that will take care of that, and if we can't we will come back. [35]

Mr. Hardy: If your Honor please, may I make this suggestion? Your Honor might make an order discharging the receiver and requiring him to turn the theatre over to the South Side Theatres.

The Court: That would be adjudicating the matter here.

Mr. Hardy: That would be an adjudication of what they are asking me to do, and I don't think I have any right to do that.

The Court: I could discharge the receiver but then the theatre would be sitting there dark.

Mr. Schwartz: How long would your Honor want to keep the matter under submission?

The Court: I am in no hurry. The investment here is such it should be protected and there should be some way of holding the matter in status quo until you know where you stand. If counsel refuses to operate I will rule on the matter.

The matter stands submitted.

(Whereupon, at 11:10 o'clock a. m., the above entitled matter was concluded.)

[Endorsed]: Filed Jan. 25, 1949. Edmund L. Smith, Clerk. [36]

In the District Court of the United States, in and for the
Southern District of California
Central Division

No. 7282-BH Civil

Honorable William C. Mathes, Judge Presiding

UNITED WEST COAST THEATRES CORPORATION and FOX WEST COAST AGENCY CORPORATION,

Plaintiffs,

vs.

SOUTH SIDE THEATRES, INC., and MARCO WOLFF, FANCHON SIMON, ROY N. WOLFF and RUBE WOLFF, joint venturers, doing business under the name of SOUTH SIDE ASSOCIATES,

Defendants.

1. TWENTIETH CENTURY-FOX FILM CORPORATION,
2. NATIONAL THEATRES CORPORATION,
3. LOEWS INCORPORATED,
4. PARAMOUNT PICTURES DISTRIBUTING CO.,
5. PARAMOUNT PICTURES, INC.,
6. PARAMOUNT FILM DISTRIBUTING CORPORATION,
7. PARAMOUNT PICTURES DISTRIBUTING CORPORATION,
8. UNIVERSAL FILM EXCHANGES, INC.,
9. RKO RADIO PICTURES, INC.,
10. WARNER BROS. PICTURES, INC.,
11. COLUMBIA PICTURES CORPORATION,
12. CHARLES P. SKOURAS,
13. SPYROS P. SKOURAS,

Third-Party Defendants.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, Monday, January 26, 1948

Appearances:

For moving plaintiffs and third-party defendants: Newlin, Holley, Sandmeyer & Coleman, by Paul Sandmeyer, Esquire and Frank R. Johnston, Esquire.

For third-party defendant Loew's Incorporated: Loeb & Loeb, by Harry B. Swerdlow, Esq.

For third-party defendant Paramount Pictures, Inc.: O'Melveny & Myers, by J. W. Chance, Esquire.

For third-party defendants RKO Pictures, Inc., and Columbia Pictures Corp.: Mitchell, Silberberg & Knupp, by Leonard A. Kaufman, Esq.

For third-party defendant Warner Bros. Pictures, Inc.: Freston & Files, by Gordon L. Files, Esq.

For defendants: MacFarlane, Schaefer & Haun, by Henry Schaefer, Jr., Esq., Russell Hardy, Esq.

Los Angeles, California, Monday, January 26, 1948
10:00 A. M.

(Case called by the clerk.)

The Court: I have read the motions, gentlemen, and the memorandum filed. Do you have anything to add in addition to what is said in the memorandum?

Mr. Swerdlow: I assume that the court is familiar with the factual situation involving the two theatres?

The Court: I have read the entire file. Is there a question of jurisdiction here?

Mr. Swerdlow: The question of jurisdiction has been raised in Judge Harrison's court and he has taken it under advisement.

The Court: I do not know of any greater waste of time of the court and counsel then for anyone to be in the Federal Court when there is no jurisdiction. Maybe I am unable to see it, but I have not seen any basis for Federal jurisdiction here. Suppose the State of California brought a proceeding contending that this arrangement was violative of the Cartwright Act, where would you be?

Suppose that was the condition upon which the parties or one of them elected to exercise the option of terminating the arrangement, would that be an action brought under the laws of the State of California?

Mr. Swerdlow: The problem arose, your Honor, as a result of the Paramount decree.

The Court: I understand. But you are suing on an agreement. May A and B make a contract and stipulate that if Congress passes the proposed revision of Title 28 of the United States Code, that either one of them shall have the option then and there to terminate it; and if so, would a suit brought to declare that agreement terminated pursuant to the exercise of the option by one party be an action brought under the Constitution or laws of the United States?

Mr. Swerdlow: Argument was made in Judge Harrison's court. He has taken it under advisement but he has made no ruling on it. But since that time the defendants have filed their counterclaim.

The Court: That won't confer jurisdiction.

Mr. Swerdlow: I realize that, but we are here on the counterclaim.

The Court: I raise the question because it is a great waste of time and effort to be here when you should be over in the State Court.

Mr. Hardy: Your Honor, may I say a word on that?

The Court: It is under submission by Judge Harrison; so I am not going to rule on it.

I have read the motions and I will rule on these motions.

Mr. Hardy: We did not make the contention in that court that there was a Federal question. I do not know whether [3] you intended to suggest—

The Court: The plaintiff makes the contention it is a Federal question.

Mr. Hardy: As a matter of fact we had a ruling, a verbal ruling, by Judge Harrison, as your Honor suggests, that there was no jurisdiction. He suggested, however, that the parties should get together and make an arrangement about continuing the Alto Theatre, continuing to operate it. We took the position that we did not want to do that; that these folks had got afoul of the anti-trust laws—

The Court: That won't help me any, Mr. Hardy. I just raised the suggestion because this meeting is just the same as if it never happened if the court does not have jurisdiction so far as the legal foundation is concerned.

Mr. Hardy: Our position is precisely as your Honor has indicated.

The Court: I will hear the motions.

* * * * *

[Endorsed]: Filed Jan. 25, 1949. Edmund L. Smith, Clerk. [4]

[Endorsed]: No. 12165. United States Court of Appeals for the Ninth Circuit. South Side Theatres, Inc., and Marco Wolff, Fanchon Simon, Roy N. Wolff and Rube Wolff, joint venturers, doing business under the name of South Side Associates, Appellants, vs. United West Coast Theatres Corporation, Twentieth Century-Fox Film Corporation, Charles P. Skouras, Spyros P. Skouras, Fox West Coast Agency Corporation, Frank Millan, Receiver, etc., Loews, Inc., RKO-Radio Pictures, Inc., Columbia Pictures Corp., Warner Bros. Pictures, Inc., and Paramount Pictures, Inc., Appellees. Transcript of Record. Appeal From the United States District Court for the Southern District of California, Central Division.

Filed January 28, 1949.

PAUL P. O'BRIEN

Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 12165

SOUTH SIDE THEATRES, INC., et al.,

Appellants,

vs.

UNITED WEST COAST THEATRES CORPORATION,
et al.,

Appellees.

POINTS AND DESIGNATIONS OF TRANSCRIPT
UNDER RULE 19, SUBDIVISION 6

Pursuant to Rule 19, Subdivision 6, the Appellants hereby make their statement of points relied upon and designation of the portions of Clerk's Transcript to be printed in support of such points.

Point I

That the District Court was without jurisdiction of the controversy and that the appointment of the Receiver was therefore void.

Point II

The appointment of the Receiver having been void the Court was without authority to charge the expense of the receivership against the Appellants.

* * * * *

Dated: February 1, 1949.

MACFARLANE, SCHAEFER & HAUN
HENRY SCHAEFER, JR.
WILLIAM P. GAMBLE
JAMES H. ARTHUR

By William Gamble

Attorneys for Appellants

RUSSELL HARDY

Of Counsel

[Affidavit of Service by Mail.]

[Endorsed]: Filed Jan. 31, 1949. Paul P. O'Brien,
Clerk.

No. 12165

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SOUTH SIDE THEATRES, INC., *et al.*,

Appellants,

vs.

UNITED WEST COAST THEATRES CORPORATION, *et al.*,

Appellees.

BRIEF FOR APPELLANTS.

MACFARLANE, SCHAEFER & HAUN,
HENRY SCHAEFER, JR.,
WILLIAM P. GAMBLE,
JAMES H. ARTHUR,

1150 Subway Terminal Building, Los Angeles 13,
Attorneys for Appellants.

RUSSELL HARDY,
Of Counsel.

APR 18 1967

PAUL P. O'BRIEN,
CLERK

TOPICAL INDEX

	PAGE
Opinion below	1
Jurisdiction of the District Court.....	1
Jurisdiction of this Court.....	3
Statement of the case.....	4
Specification of errors.....	14
Questions presented	14
Argument	15
There was no principal subject of Federal jurisdiction to which the receivership was ancillary.....	15
A Federal Court has no jurisdiction to appoint a receiver and maintain a receivership where the receivership is an end in itself	17
A judgment of a court which has no jurisdiction is void.....	17
A court which has instituted and continued a receivership without jurisdiction, may not assess any of the costs and expenses of the receivership against the property or against the defendants	18
Conclusion	20

TABLE OF AUTHORITIES CITED

CASES

Butler v. McKey, 138 F. 2d 373.....	18.
Finnerand v. Burton, 291 Fed. 37.....	19
Fryer v. Weakley, 261 Fed. 509.....	18
Gordon v. Washington, 295 U. S. 30.....	17
Hawes v. First Nat'l Bank, 229 Fed. 51.....	19
Kelleam v. Maryland Casualty Co., 312 U. S. 377.....	17
Noxon Chemicals Products Co. v. Leckie, 39 F. 2d 318.....	19
Pusey and Jones Co. v. Hanssen, 261 U. S. 491.....	17
Rhode Island v. Massachusetts, 12 Pet. 657.....	18
Robinson v. Edler, 78 F. 2d 817.....	18
St. Louis and San Francisco Ry. Co. v. Wilson, 114 U. S. 60....	16
Salem Trust Co. v. Manufacturers Finance Co., 264 U. S. 182....	16
Shapiro v. Wilgus, 287 U. S. 348.....	17
Thomson v. Butler, 136 F. 2d 644.....	16
United States v. Paramount Pictures, Inc., et al., 68 S. Ct. 915....	5
Wylie v. State Board of Equalization, 21 Fed. Supp. 604.....	16

STATUTES

Act of Congress, July 2, 1890, Sec. 1 (15 U. S. C. A., Sec. 4)....	2
United States Code, Title 28, Sec. 1291.....	3
United States Code, Title 28, Sec. 1292.....	3
United States Code, Title 28, Sec. 1331.....	1
United States Code, Title 28, Sec. 1332.....	1
United States Code, Title 28, Sec. 1337.....	1

No. 12165

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

SOUTH SIDE THEATRES, INC., *et al.*,

Appellants,

vs.

UNITED WEST COAST THEATRES CORPORATION, *et al.*,

Appellees.

BRIEF FOR APPELLANTS.

Opinion Below.

This is an appeal from an order of the United States District Court for the Southern District of California, Central Division, entered on November 22, 1948. The order of the District Court [R. 90] has not been published. No written opinion has been prepared or filed by that Court.

Jurisdiction of the District Court.

The rules of this Court require that the brief shall disclose the basis upon which it is contended the District Court had jurisdiction. Appellants contend that the District Court had no jurisdiction of this case for any purpose. Jurisdiction, if it had existed, would have to be based on Title 28, United States Code, section 1331 or 1332 or 1337, which read as follows:

Section 1331. The district courts shall have original jurisdiction of all civil actions wherein the matter in

controversy exceeds the sum or value of \$3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States.

Section 1332. (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$3,000, exclusive of interest and costs, and is between:

(1) Citizens of different States; * * *

Section 1337. The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

The complaint was filed by appellees on July 1, 1947. [R. 16.] One of the appellees, United West Coast Theatres Corporation, is a corporation under the laws of California; and the other, Fox West Coast Agency Corporation, is a corporation of Delaware. Both were alleged to be doing business at Los Angeles. The defendants, appellants here, were all citizens of California, both as to the corporate and individual defendants.

The action is for declaratory relief; that is, to declare that a contract between the parties be terminated. [R. 9.]

Jurisdiction was based on the ground that "the matter in controversy exceeds the sum or value of three thousand dollars (\$3,000), and arises under the laws of the United States, to wit: Section 1 of the Act of Congress of July 2, 1890, 15 U. S. C. A. Sec. 4, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,' commonly known as the Sherman Act." [R. 2.]

On July 1, 1948, the District Court entered an order making an *ex parte* appointment of a temporary receiver. [R. 17.] On August 25, 1947, appellants filed a return and a motion to dismiss, which questioned the sufficiency of the complaint and the jurisdiction of the District Court. [R. 18, 50.] The District Judge refused to dismiss the complaint and discharge the receiver, although he decided that the District Court had no jurisdiction. One of his repeated statements to that effect was "after studying this I am satisfied this court has no jurisdiction." [R. 112, 101-105, 113, 114.] District Judge William C. Mathes, of the same court, before whom a question in the case was argued, also observed, "Maybe I am unable to see it, but I have not seen any basis for Federal jurisdiction here." [R. 127.] For purely extra-jurisdictional reasons, however, the District Judge refused to dismiss the case, and, instead, entered the order appealed from.

Jurisdiction of This Court.

Jurisdiction of this Court is based on Title 28, United States Code, sections 1291 and 1292, reading as follows:

Section 1291. The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, . . . **except** where a direct review may be had in the Supreme Court.

Section 1292. The courts of appeals shall have jurisdiction of appeals from:

.

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property; . . .

Statement of the Case.

On an *ex parte* application, on July 1, 1947, the District Court appointed a receiver for real estate of appellants at Los Angeles, consisting of a motion picture theatre and stores. [R. 17.] Although the District Judge said, "I am satisfied this court has no jurisdiction," he continued the receivership for seventeen months thereafter, he has approved and permitted purely receivership and other improper charges to be deducted from an income derived from the unlawful possession and use of appellants' property; has impounded that income with the Clerk of the District Court; and, although no objection has been made by any party, has refused to permit delivery of that fund to appellants.

This case occurred because of violations of the Sherman Antitrust Act by appellees. We do not mean, however, that this case is a proceeding under the antitrust laws. On July 20, 1938, the United States filed a petition in the District Court at New York, charging numerous corporations engaged in distributing and exhibiting motion pictures with engaging in a conspiracy to restrain and monopolize the business, especially in the exhibition field.

The petition made three charges against the defendants in that case which are of interest in this case, *i. e.*, (1) that they controlled the supply of pictures needed in the theatres; (2) that by preventing theatre owners from procuring a supply of pictures, they had compelled the owners to sell their theatres; and (3) that they had forced owners of independent theatres to place their theatres in pools of competitive theatres controlled and operated by the defendants.

The petition prayed that the defendants be divested of theatres unlawfully acquired, and that they be enjoined from further control and operation of the pools.

On December 31, 1946 (eight years after the case was instituted), the District Court at New York entered a judgment enjoining performance of the pooling agreements as of July 1, 1947. The judgment stated that the defendants were enjoined "From making or continuing to perform pooling agreements whereby given theatres of two or more exhibitors normally in competition are operated as a unit or whereby the business policies of such exhibitors are collectively determined by a joint committee or by one of the exhibitors or whereby profits of the 'pooled' theatres are divided among the owners according to prearranged percentages." [R. 6.]

The case was appealed to the Supreme Court of the United States. On May 6, 1948, that Court affirmed the injunction against theatre pooling and remanded the case to the District Court with directions that the defendants be divested of theatres acquired by monopoly methods.

United States v. Paramount Pictures, Inc., et al.,
68 S. Ct. 915.

The appellees here, *i. e.*, United West Coast Theatres Corporation and Fox West Coast Agency Corporation, were not named as parties in the Government case, in the judgment or otherwise, directly or indirectly. Nevertheless, they consider the judgment applied to them, because they are subsidiaries of defendants named in the judgment, *i. e.*, Twentieth Century-Fox Film Corporation and National Theatres Corporation. [R. 6.]

In 1939 and 1940 appellants built two neighborhood motion picture theatres, at Inglewood and Los Angeles, California, about three-fourths of a mile from each other. These theatres were named the Alto and the Fifth Avenue. Simultaneously the appellees also built a theatre about a block and a half from the Fifth Avenue. It was named the Academy. The three theatres, which were substantially similar in size, furnishings and otherwise, were completed and ready for opening at about the same time.

For the Alto, appellants succeeded with no trouble in procuring a supply of pictures, and an exhibition business was inaugurated at the theatre. For the Fifth Avenue, however, the film companies, uniformly and continuously refused to furnish any pictures to appellants. For the Academy, the film companies immediately began to furnish a full and continuous supply of pictures, and that theatre opened shortly after the Alto.

After the new Fifth Avenue theatre had remained closed and unused for more than a year, the appellees proposed that the real estate be sold to them and that possession of the Alto theatre be placed in their hands, whereupon they would procure pictures for the Fifth Avenue theatre and operate both theatres as a joint venture for both parties. For appellants, this presented the choice of half a loaf or none.

Accordingly, appellants conveyed the real estate and personal property of the Fifth Avenue theatre to appellees; and on April 1, 1941, the parties entered into an agreement pooling the operation of both theatres exclusively in the hands of United West Coast Theatres Corporation, for ten years ending March 31, 1951. It was agreed that the proceeds of the pooled theatres should be divided fifty-one

per cent to appellees and forty-nine per cent to appellants, and that Fox West Coast Agency should receive $5\frac{1}{4}$ per cent of the gross receipts for supervision of the joint business.

The acquisition of the Fifth Avenue theatre and the pooling of both theatres, were made by appellees despite the fact that such transactions on their part were then specifically named in the Government antitrust proceedings as monopolistic and illegal. Instead of deterring appellees, however, the illegal character of the transaction merely induced them to attempt to secure themselves against liability. At the same time, therefore, appellees prepared a separate agreement, which recited that their conduct was then under scrutiny by the Government, and that if the pooling agreement should be objected to by the Attorney General as unlawful or a judgment should be entered enjoining the agreement, either party should have an election to terminate the pool without further obligation. [R. 10.]

The judgment of the New York District Court of December 31, 1946, enjoined the defendants from continuing to perform pooling agreements by which theatres were operated as a unit. Appellees, concluding that this applied to the Fifth Avenue-Alto pooling agreement, on June 9, 1947, informed appellants that the agreement would be terminated on June 30, 1947. On June 10, 1947, they informed appellants that they elected to terminate the agreement forthwith. On June 27, 1947, they informed appellants that they would terminate the operation of the Alto theatre at midnight June 30. All that appellees were required to do was what they thus stated, *i. e.*, to discontinue the joint operation of the theatres. To this appellants made no objection. When appellees should have discon-

tinued performance and departed, they intended to resume possession and to operate the Alto theatre. [R. 118-119.]

Appellants, however, were prevented by action taken by appellees from acting upon and accomplishing that intention. At midnight of June 30, 1947, as appellees had stated, their interest in the operation of the Alto theatre property and business had terminated. The next day, however, in *ex parte* proceedings had without notice to appellants, they procured the appointment of a temporary receiver, who immediately took possession of the Alto theatre property and business, including the collection of rents and operation of the theatre, to the total exclusion of appellants. What occurred at the *ex parte* hearing, is not shown by the record, other than the statement of the District Judge to counsel for appellees at a subsequent hearing, that:

You stated to me when you presented this *ex parte* that you did not know whether you were going to be held in contempt of that decree or not and that you didn't know where you stood and you wanted a determination of that question. [R. 106.]

In the complaint, filed on July 1, 1947, by appellees, it was alleged that this case arose under the Sherman Antitrust Act; that the parties had made the theatre pooling agreement; that the New York District Court had entered a judgment which the appellees believed enjoined the further performance of that agreement; that they feared continued performance by them would be in contempt of that judgment; that they had requested appellants to take and operate the theatre; that appellants had refused; and that if the theatre was not operated following

their departure there would be a loss of profits and irreparable damage.

The prayers asked that the Court declare the pooling agreement to be terminated, that the appellees were no longer bound to perform, and that a receiver be appointed to take charge of the property and to operate the theatre.

Appellants were ordered to show cause why the receiver should not be made permanent; and they filed a return to that order objecting to the jurisdiction for any purpose.

At the hearing, the District Judge held that the Court had no jurisdiction for any purpose. He said:

But we have a situation here where it appears to this court, as indicated the other day, this court has no jurisdiction whether there had been an action filed in New York or not. [R. 104.]

Counsel, after studying this I am satisfied this court has no jurisdiction. I think the lack of jurisdiction can be sustained, first, as reflected by your complaint—no diversity of citizenship, and, secondly, that the New York court has assumed jurisdiction. [R. 112.]

I am going to sign an order that so far as this court is concerned, will terminate the receivership. [R. 115.]

Despite this decision, the District Judge refused to terminate the receivership and clear the way for appellants, because they declined to make an agreement with appellees which was insisted upon by the District Judge, but which he had no authority to require. He insisted that appellants make an agreement and stipulation with appellees (1) for the immediate assumption by appellants of the possession and operation of the theatre without any inter-

ruption, and (2) for the protection of the appellees against any prejudice, liability or damage. In this regard, the District Judge said:

The problem that is concerning me is if there cannot be some arrangement made for the operation of this theatre without closing it down, resulting in a loss. There should be some way to avoid that. For instance, if it is closed down and if you [appellees] are eventually wrong in this matter, you would be liable for damages. On the other hand, if you eventually prove you are right you would still be damaged. [R. 112.]

I am talking about this not from a legal point of view but from a practical point of view, from a common sense point of view. Some arrangement should be made for the operation of this theatre until this litigation is completed. [R. 114.]

Now what I want is not a legal problem. It is a *business problem* whereby some arrangement be made that will continue the operation of this theatre—to see that some night it isn't closed down. That isn't a legal problem but there is a practical problem confronting all of us. [R. 115.] (*Italics added.*)

Counsel, let me say this: I am going to take this matter under submission and if you gentlemen do not agree or do not make an honest effort to keep this theatre open I may hear this matter on its merits and let a receiver stay in there until the Supreme Court passes upon it and we have a ruling and thereby retaining jurisdiction.

I am giving you gentlemen an opportunity to get together around a table and work out a decent, fair method to prevent the accumulation of unnecessary damages. If counsel are not willing to do that they are not entitled to any courtesies from this court or any aid. [R. 118.]

The concern of the District Judge was not merely to have the theatre operated by appellants, for he was repeatedly assured on that score. Counsel for appellants said:

I think we shall take such action as will prevent unnecessary loss to us when they comply with the decree. They can walk away from the theatre. I think that is all, in a word, that the decree requires them to do. [R. 114.]

Well, of course, we will make arrangements to prevent unnecessary loss. I do not mean to say that we will make arrangements with these parties. Their arrangements have gotten them afoul of the Anti-Trust law. [R. 115.]

Your Honor may depend upon it that we are going to do everything possible to avoid unnecessary damages. [R. 118.]

If they do what the decree required them to do, to discontinue the performance of that contract and walk away from the theatre, so to speak. I think we shall do everything possible to resume possession and operate the theatre, but we may have at once a problem. [R. 118-119.]

We don't want the theatre closed. We have no desire to have it closed simply to get damages. It is

our theatre and we want it to be a going business, a going enterprise, but we do not want to make any arrangement with these parties with regard to what shall be done—what we shall do with the treatre. [R. 121.]

On November 22, 1948, the District Judge entered an order allowing the receiver a fee of \$2,000 and the receiver's attorneys a fee of \$2,000. The order also approved the final account, which included other receivership items, and discharged the receiver. As to the balance for distribution, the order recited that "the ownership of the net income is subject to dispute between the parties." Accordingly, it was further ordered that the balance (\$59,262.92), be deposited with the Clerk to be held pending further order of the Court [R. 90-91.]

It is not correct that there was a dispute between the parties as to the ownership of the receivership income. Nor has any party objected to distribution of the fund to appellants. The objections made by appellants were not as to the ownership of the income, but to the validity of the receivership, to the unlawful deprivation of the possession and use of their property, and to the deduction from the income collected during that unlawful possession and use, of expenses and payments applicable only to the receivership, including the sum of \$5,200 plus \$400 Christmas bonus which was deducted from the account under "other expenses" [R. 77, 83] and paid to the receiver under an order of July 8, 1948. [R. 48.]

In approving the receiver's final account, the District Court allowed additional receivership expenses of \$572.50, to which objection was made, and denied appellants' request that the receiver and appellees be required to account for shortages on sales of candy and popcorn of \$3,387.60. In other words, with these corrections the income for distribution to appellants should have been \$72,823.03 instead of \$59,262.92, as follows:

Salaries for services rendered in July 1948 for receivership termination activities.....	\$ 450.00
Miscellaneous expenses	72.51
Receivership bond	50.00
Receiver's fee	2000.00
Receiver's attorneys' fee.....	2000.00
Candy shortage	590.31
Popcorn shortage	2797.29
	<hr/>
	7960.11
Income deposited with the Clerk.....	59262.92
Interim compensation paid to receiver.....	5600.00
	<hr/>
	\$72823.03

[R. 82, 86-87, 88, 91; Unprinted Record.]

Upon departure of the receiver, appellants entered into possession of the theatre property and resumed operation of the business.

The Clerk of the District Court now holds the \$59,262.92 claimed by appellants.

Specification of Errors.

The District Court was without jurisdiction, and the appointment of the receiver was therefore void.

The District Court was without authority to charge any expenses of the receivership against appellants, and to impound and withhold money collected by the receiver and belonging to them.

Question Presented.

The question presented by this appeal is whether the complaint states a claim arising under the Constitution, laws or treaties of the United States, or under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies, or shows the necessary diversity of citizenship among the parties; and whether, where the complaint fails to state such a claim or such a diversity of citizenship, the District Judge may institute and continue a receivership of property and assess against it costs, receiver's and attorneys fees, and expenses of administration of such receivership.

ARGUMENT.

There Was No Principal Subject of Federal Jurisdiction to Which the Receivership Was Ancillary.

The action stated in the complaint did not arise under the Constitution, laws or treaties of the United States, nor under any Act of Congress regulating trade and commerce or protecting trade and commerce against restraints and monopolies.

The complaint alleged that the matter exceeded \$3,000 and arose under the Sherman Antitrust Act, but appellees merely asked that the District Court declare whether they were bound by a contract. No allegations are contained in the complaint which show any dispute or controversy with respect to the validity, construction or effect of any law of the United States, or that the determination of any question depends upon, or that any right is claimed under, any law of the United States. The only adjudication possible under the allegations of the complaint would be with regard to the contractual obligation of appellees under general law. As a reason for seeking that declaration, appellees alleged that they desired to learn whether they would be guilty of contempt of the District Court for the Southern District of New York, under a decree entered on December 31, 1946, in an antitrust case. [R. 2, 6, 9.] But so far as contempt is concerned, the judgment of the Court below would have been of no validity in the New York District Court where contempt proceedings would be had. Such a contempt proceeding would be a controversy between the New York District Court and appellees, or between them and the Attorney General of the United States, neither of whom was a party in this case.

The determination as to the contractual obligation of appellees which they sought from the District Court, did not

call upon that Court to consider and apply the antitrust laws or any principle of the law of restraint of trade and monopoly. At most, it merely required a decision whether the judgment of the New York District Court applied to the contract. At most this was merely a matter of construction. Whether the judgment was valid, and whether the pooling contract was violative of the antitrust laws independently of that judgment, were neither raised nor within the jurisdiction of the District Court.

There is not the necessary diversity of citizenship in the parties because California citizens are on both sides of the case. One of the plaintiffs is a California corporation, and the other is a Delaware corporation. The defendants are one corporation and four individuals, the corporation being a California corporation and the individuals being residents and citizens of California. [R. 2-3.]

Where all of the plaintiffs are not citizens of different States from all of the defendants, the necessary diversity of citizenship does not exist.

St. Louis and San Francisco Railway Co. v. Wilson, 114 U. S. 60, 29 L. Ed. 66;

Salem Trust Co. v. Manufacturers Finance Co., 264 U. S. 182, 68 L. Ed. 628;

Thomson v. Butler, 136 F. 2d 644, 647 (C. C. A. 8).

In *Wylie v. State Board of Equalization*, 21 Fed. Supp. 604, in which the plaintiffs were citizens of California and Rhode Island and the defendant was a citizen of California, the District Court at Los Angeles dismissed the action, because "Only one of the plaintiffs is a non citizen of California and 'District Courts have jurisdiction if all the parties on the one side are of citizenship diverse to those on the other side'."

A Federal Court Has No Jurisdiction to Appoint a Receiver and Maintain a Receivership Where the Receivership Is an End in Itself.

Kelleam v. Maryland Casualty Co., 312 U. S. 377;

Gordon v. Washington, 295 U. S. 30;

Shapiro v. Wilgus, 287 U. S. 348;

Pusey and Jones Co. v. Hanssen, 261 U. S. 491.

The only reasons for maintaining the receivership were to operate the theatre without closing it down and to protect appellees against liability because of their unlawful pooling contract. That these were not subjects of Federal or general equitable and legal jurisdiction, was stated by the District Judge. He said this was not a legal but a business problem. He was not correct in stating that it was "a practical problem confronting all of us" [R. 115], if he meant that it was a problem confronting the Court.

A Judgment of a Court Which Has No Jurisdiction Is Void.

Jurisdiction is the power to hear and determine the subject matter in controversy between parties to a suit, to adjudicate or exercise any judicial power over them; the question is, whether on the case before a court, their action is judicial or extrajudicial, with or without the authority of law, to render a judgment or decree upon the rights of the litigant parties. If the law confers the power to render a judgment or decree, then the Court has jurisdiction; what shall be adjudged or decreed between the par-

ties, and with which is the right of the case, is judicial action, by hearing and determining it.

.

But as this court is one of limited and special original jurisdiction, its action must be confined to the particular cases, controversies, and parties over which the Constitution and laws have authorized it to act, any proceeding without the limits prescribed is *coram non judice*, and its action is a nullity. . . . And whether the want or excess of power is objected by a party or is apparent to the court, it must surcease its action or proceed extrajudicially. *Rhode Island v. Massachusetts*, 12 Pet. 657, 718-719.

It is a basic rule that a judgment is void and subject to collateral attack if a lack of jurisdiction in the court appears on the face of the record. *Butler v. McKey*, 138 F. 2d 373, 376, C. C. A. 9.

Robinson v. Edler, 78 F. 2d 817, 818, C. C. A. 9.

A Court Which Has Instituted and Continued a Receivership Without Jurisdiction, May Not Assess Any of the Costs and Expenses of the Receivership Against the Property or Against the Defendants.

In such a case the receiver must look to the person procuring his appointment for payment of costs and expenses and reimbursement for his services.

In *Fryer v. Weakley*, 261 Fed. 509, 514 (C. C. A. 8), after stating that the District Court had no jurisdiction to appoint a receiver, the Court, speaking through Judge Sanborn, said:

“The conclusion is that this case falls clearly without the jurisdiction of this court, under the opinion

of Judge Carland in *Hawes v. First National Bank*, 229 Fed. 51, 143 C. C. A. 645. The order of the court below appointing the receiver must therefore be reversed, and the case must be remanded to the District Court, with directions to cause all the moneys and property and all the proceeds of the property seized or collected by the receiver to be paid over and delivered to the defendants W. S. Fryer and G. L. Fryer, and to tax the costs and expenses of the receiver against the plaintiff below. The court, being without jurisdiction, has no property to pay them. As was well said by Judge Carland in the Hawes Case:

“Where a receivership is procured illegally, the costs of the receivership may be taxed against the complainant procuring the appointment. . . . Courts may not seize property without jurisdiction, and then claim jurisdiction over the property because it is in the possession of the court.”

Finnerand v. Burton, 291 Fed. 37, 34 A. L. R. 1351;

Noxon Chemicals Products Co. v. Leckie, 39 F. 2d 318.

Conclusion.

We respectfully submit that the judgment of the District Court should be reversed, with directions to the District Court to disallow all receivership expenses as charges against appellants, to require the receiver or the appellees to make payment of those charges and of any and all shortages in the receivership estate, and to make distribution to appellants of the funds held by the Clerk of the District Court.

Respectfully submitted,

MACFARLANE, SCHAEFER & HAUN,

HENRY SCHAEFER, JR.,

WILLIAM P. GAMBLE,

JAMES H. ARTHUR,

By WILLIAM P. GAMBLE,

Attorneys for Appellants.

RUSSELL HARDY,

Of Counsel.

No. 12165

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SOUTH SIDE THEATRES, INC., *et al.*,

Appellants,

vs.

UNITED WEST COAST THEATRES CORPORATION, *et al.*,

Appellees.

BRIEF FOR APPELLEES.

GURNEY E. NEWLIN,

CLYDE E. HOLLEY,

GEORGE W. TACKABURY,

FRANK R. JOHNSTON,

NEWLIN, HOLLEY, SANDMEYER & TACKABURY,

1020 Edison Building, Los Angeles 13,

Attorneys for Appellees.

FILED

MAY 18 1949

TOPICAL INDEX

	PAGE
Statement of jurisdiction.....	1
A. Jurisdiction of the District Court.....	1
B. Jurisdiction of the United States Court of Appeals.....	2
Statement of the case.....	3
Questions involved	7
Argument	8
I.	
The District Court had jurisdiction of the action by reason of the existence of a federal question.....	8
A. The fact that there are two grounds alleged in support of plaintiffs' claim or cause of action, one of which may not present a federal question, does not deprive the court of jurisdiction.....	10
II.	
If it be held that plaintiffs' complaint defectively alleges juris- diction, appellees request leave to amend said complaint.....	13
Conclusion	19
Appendices :	
Appendix A. Complaint for declaratory relief.....	App. p. 1
Appendix B. Amended complaint for declaratory relief.....	App. p. 9

TABLE OF AUTHORITIES CITED

CASES	PAGE
American Amusement Co. v. Ludwig, 82 Fed. Supp. 265.....	10
Burnrite Coal Briquette Co. v. Riggs, 6 F. 2d 226.....	18
Carter v. Bramlett, 51 Fed. Supp. 547.....	10
Finneran v. Burton, 291 Fed. 37.....	18
General Investment Co. v. N. Y. C. R. Co., 271 U. S. 228.....	8, 9
Hurn v. Oursler, 289 U. S. 238.....	11
Keene Lumber Co. v. Leventhal, 165 F. 2d 815.....	13, 15
Norton v. Larney, 266 U. S. 511.....	10, 13, 14, 15
Noxon Chemical Products Co. v. Leckie, 39 F. 2d 318.....	18
Rambusch Dec. Co. v. Brotherhood of Painters, etc., 105 F. 2d 134; cert. den. 308 U. S. 587.....	8
Rothschild & Co. v. Marshall, 44 F. 2d 546.....	12
Savage v. United States District Court, 144 F. 2d 575.....	16
Siler v. Louisville & N. R. Co., 213 U. S. 175.....	12
Southern Pac. Co. v. Van Hoosear, 72 F. 2d 903.....	11
State of New York, In the Matter of the, 256 U. S. 490.....	16
The First National Bank v. Williams, 252 U. S. 504.....	10
Young & Jones v. Hiawatha Gin Mfg. Co., 17 F. 2d 193.....	10

STATUTES

Act of Congress, July 2, 1890, Sec. 1.....	3
Federal Rules of Civil Procedure, Rule 15c.....	15
United States Code, Title 26, Sec. 1292.....	16
United States Code, Title 28, Sec. 41, Subd. (1) (a).....	1
United States Code, Title 28, Sec. 41, Subd. (8).....	1
United States Code, Title 28, Sec. 41, Subd. (23).....	1
United States Code, Title 28, Sec. 399.....	13
United States Code, Title 28, Sec. 1291.....	2
United States Code, Title 28, Sec. 1653.....	13, 14

No. 12165

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SOUTH SIDE THEATRES, INC., *et al.*,

Appellants,

vs.

UNITED WEST COAST THEATRES CORPORATION, *et al.*,

Appellees.

BRIEF FOR APPELLEES.

STATEMENT OF JURISDICTION.

A. Jurisdiction of the District Court.

This action was instituted by the filing of a complaint in the United States District Court for the Southern District of California, Central Division, by appellees United West Coast Theatres Corporation and Fox West Coast Agency Corporation on July 1, 1947, seeking a declaration of whether or not a certain agreement to which they and appellants were parties was in violation of the antitrust laws of the United States [R. 2-9]. The basis of the jurisdiction of the District Court is the existence of a federal question, this being a case arising under the laws of the United States. Jurisdiction existed by virtue of 28 U. S. C. 41, subdivision (1)(a), 28 U. S. C. 41, subdivision (8) and also 28 U. S. C. 41, subdivision (23):

“Section 41. Original jurisdiction. The district courts shall have original jurisdiction as follows:

“(1) *United States as plaintiff; civil suits at common law or in equity.* First. Of all suits of a civil nature at common law or in equity, brought by the United States, or by any officer thereof authorized

by law to sue, or between citizens of the same State claiming lands under grants from different States; or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, * * *

“(8) *Suits for violation of interstate commerce laws.* Eighth. Of all suits and proceedings arising under any law regulating commerce.

* * * * *

“(23) *Suits against trusts, monopolies, and unlawful combinations.* Twenty-third. Of all suits and proceedings arising under any law to protect trade and commerce against restraints and monopolies.

* * *

The allegations of appellees' complaint showing jurisdiction are contained in paragraphs I, IV, V, VI, IX, XI, XII and XIII [R. 2, 3, 5, 7, 8] and are analyzed fully in the subsequent portions of this brief. The complaint in its entirety is set forth as Appendix A hereto.

Inasmuch as the jurisdiction of the District Court over the subject matter of this action is the fundamental issue upon this appeal, a more complete discussion of the court's jurisdiction will appear *infra*.

B. Jurisdiction of the United States Court of Appeals.

Jurisdiction of this Court is found in 28 U. S. C. Section 1291:

“The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, * * * except where a direct review may be had in the Supreme Court.”

STATEMENT OF THE CASE.

On July 1, 1947, United West Coast Theatres Corporation and Fox West Coast Agency Corporation, as plaintiffs, brought an action against South Side Theatres, Inc., Marco Wolff, Fanchon Simon, Roy N. Wolff and Rube Wolff, joint venturers, doing business under the name of South Side Associates, to have declared the rights of the parties under a certain contract the provisions of which are alleged in plaintiffs' complaint. Shorn of non-essential allegations and stripped of surplusage, the complaint contains the following allegations clearly giving the District Court jurisdiction:

In paragraph I it is alleged that the matter in controversy, exclusive of interest and costs, exceeds the sum of \$3,000.00 and arises under the laws of the United States, to wit, Section 1 of the Act of Congress of July 2, 1890, commonly known as the Sherman Act [R. 2].

Allegations follow in paragraphs IV and V that plaintiff-appellee United West Coast Theatres Corporation is the lessee of the Fifth Avenue Theatre and that defendant-appellant South Side Theatres, Inc., is the owner of the Alto Theatre [R. 3].

In paragraph VI it is alleged that on April 1, 1941, plaintiffs entered into a written agreement with defendant South Side Theatres, Inc., by the terms of which said theatres were to be operated by plaintiffs and defendant South Side Theatres, Inc., as a joint venture for a term of ten years beginning April 1, 1941. Under the terms of this agreement, as alleged in the complaint, United West Coast Theatres Corporation was entitled to 51% of the proceeds of the venture and liable for 51% of the losses, and South Side Theatres, Inc., was entitled to 49% of the profits and liable for 49% of the losses [R. 3, 4].

Paragraph IX alleges that a Special Expediting Court sitting as the United States District Court for the Southern District of New York in the matter of United States of America, plaintiff, v. Paramount Pictures, Inc., *et al.*, defendants, Equity No. 87-273, filed an opinion on July 11, 1946, indicating that certain agreements between owners of two or more theatres normally in competition were illegal and it is further alleged in that paragraph that the decree of the court dated December 31, 1946, enjoined the defendants in that action

“From making or continuing to perform pooling agreements whereby given theatres of two or more exhibitors normally in competition are operated as a unit or whereby the business policies of such exhibitors are collectively determined by a joint committee or by one of the exhibitors or whereby profits of the ‘pooled’ theatres are divided among the owners according to prearranged percentages.”

It is further stated that the provisions of the decree became effective July 1, 1947 [R. 5, 6].

In paragraph XI it is stated that the venture agreement is a written contract in which plaintiffs are interested and with reference to which plaintiffs desire a declaration with respect to the rights or liabilities of the plaintiffs and defendants [R. 7].

Paragraph XII states that a controversy exists between plaintiffs and defendants as to their legal rights and liabilities and further contains the allegation that:

“Plaintiffs contend that by reason of the provisions of the termination agreement and by reason of the

provisions of the Decree in United States v. Paramount Pictures, Inc., *et al.*, plaintiffs are no longer obliged to and are no longer legally permitted to perform the venture agreement and that performance of the venture agreement has been rendered impossible and terminated by operation of law.”

There follows in this paragraph the allegation that defendants contend that plaintiffs are still bound by the venture agreement and required to perform the same [R. 7].

Paragraph XIII alleges that the defendant South Side Theatres, Inc., has been tendered the possession of the Alto Theatre but that it refuses to take possession thereof and the appointment of a receiver is requested to operate the Alto Theatre [R. 8].

The complaint contains additional allegations, among others, in paragraph VII, that on the same date plaintiffs and defendants entered into the venture agreement they also entered into an agreement providing for the termination of the venture agreement upon certain contingencies, including the entry of a decree in an action brought by the United States of America against any parties to the venture agreement requiring or directing the parties to terminate the agreement. It is further alleged that plaintiffs served a notice of termination upon the defendant South Side Theatres, Inc.

The District Court thereupon *ex parte* appointed Frank Millan receiver of the Alto Theatre on July 1, 1947 [R. 17].

Defendants filed a return on the order to show cause why the appointment should not be made permanent [R. 18]. In this return the defendants did not challenge the existence of a federal question but challenged the propriety of the United States District Court for the Southern District of California acting in the matter and made the claim that the sole courts having jurisdiction were the United States District Court for the Southern District of New York and the Supreme Court of the United States [R. 18].

At the time of the hearing on the order to show cause, counsel for the plaintiffs stated the ground upon which jurisdiction was based:

“Our contention in this court, your Honor, and I hope I can make it clear, is that we are asking you to find that this joint venture agreement under the Sherman Act, is illegal.

“We cite the case in our complaint because it is perfectly proper, the Paramount decree, as authority for holding that this joint venture agreement in this lawsuit is illegal.” [R. 108.]

And later during the hearing:

“We are not asking this court to construe the termination agreement. That is properly a matter for the State court. What we are asking this court to do is determine the legality or illegality under one of the laws of the United States, of this joint venture agreement which brought about this situation.” [R. 110.]

No appeal was taken from the order appointing the receiver nor was any other effort made to obtain a review of this order by an appellate court. The receiver continued to operate the Alto Theatre; the receiver was recognized to have been duly appointed by counsel for appellants [R. 110], and his entering into a wage agreement, concerning the Alto Theatre, with a projectionist union was approved by appellants' attorneys on or about February 26, 1948 [R. 51].

On September 16, 1948, the receiver filed his final report [R. 76], and it was approved by the court and the receiver ordered discharged by order dated November 22, 1948 [R. 90]. Appellants have taken an appeal from the order approving the final account of the receiver and allowing receiver's fees and attorney's fees [R. 92].

Questions Involved.

The questions involved are (1) whether the District Court had jurisdiction of the action for declaratory relief, and (2) whether if the complaint is defective in its jurisdictional allegations may it now be amended.

ARGUMENT.

I.

The District Court Had Jurisdiction of the Action by Reason of the Existence of a Federal Question.

Plaintiffs' complaint is set forth in its entirety in Appendix A.

The italicized portions of plaintiffs' complaint, as it is presented in Appendix A, clearly present a federal question and vested the District Court with jurisdiction.

An analogous case is *Rambusch Dec. Co. v. Brotherhood of Painters, etc.*, 105 F. 2d 134 (C. C. A. 2), certiorari denied 308 U. S. 587. In the cited case Rambusch had an agreement with the Union providing that Rambusch would pay the prevailing wage at the situs of the job or the New York wage, whichever might be the higher. Rambusch undertook a contract in Roanoke, Virginia, and a controversy arose as to whether Rambusch was required to pay the New York wage to the Union workers, which was higher than the Roanoke wage. Rambusch brought an action for declaratory relief, asking that the court declare that its contract with the Union as to the wage provision was illegal, in that it was a violation of the anti-trust laws. The court held that there was jurisdiction to determine this question, saying at page 136:

"The petition for a declaration of illegality of a contract under the anti-trust laws and of unlawful restraint of interstate trade by the defendants does, however, present a federal question adequate to give the District Court jurisdiction."

The Supreme Court in *General Investment Co. v. N. Y. C. R. Co.*, 271 U. S. 228, held that an action similar to the instant case was a suit arising under the laws of the

United States as to which the District Courts are given jurisdiction. This was a suit in equity brought by a minority stockholder against the New York Central Railroad Company to enjoin it from dominating and controlling through stock ownership certain other railroad companies. The bill in equity alleged that the defendant through a consolidation agreement acquired the railroad lines of certain other companies and in addition acquired large amounts of stock in other competing companies and charged that the domination and control of these other companies was in violation of the Sherman Antitrust Act. While apparently diversity of citizenship existed, the Supreme Court placed jurisdiction directly upon the existence of a federal question, saying at page 230:

“In the bill, as we have shown, the plaintiff attempts with much detail to set forth a continuing violation of the Sherman Anti-trust Act and the Clayton Act, asserts that this violation unless restrained will be injurious to the plaintiff and other stockholders and prays for relief by injunction. Such a suit is essentially one arising under the laws of the United States, and, as the requisite value is involved, is one of which the district courts are given jurisdiction.”

It is obvious that the fundamental question in the pleading under consideration in *General Investment Co. v. New York C. R. Co.*, *supra*, as in the instant case, was the legality of certain agreements under the anti-trust laws. The fact that in *General Investment Co. v. New York C. R. Co.*, *supra*, the plaintiff proceeded by an injunction suit whereas here plaintiffs asked for declaratory relief is of no significance.

It is interesting to note that in a very recent case seeking determination of a question under the declaratory

relief statute, identical with the question presented in the complaint herein, Judge Nordbye in *American Amusement Co. v. Ludwig* (D. C., Minn.), 82 Fed Supp. 265, 266, recognized that jurisdiction existed by reason of the presence of a federal question.

See also:

The First National Bank v. Williams, 252 U. S. 504;

Young & Jones v. Hiawatha Gin Mfg. Co., 17 F. 2d 193 (D. C., Miss.);

Carter v. Bramlett, 51 Fed. Supp. 547 (D. C., Tex.).

The theory of jurisdiction under which the plaintiffs were proceeding in the case at bar was clearly stated by plaintiffs' counsel upon the return of the order to show cause why the receivership should not be made permanent, as indicated by the excerpts from the transcript of the hearing of September 10, 1947, quoted above at page 6 of this brief [R. 108, 110].

Even in a situation where jurisdictional facts are not clearly stated in the complaint, if the record *dehors* the complaint indicates a basis for jurisdiction, the court is privileged to assume jurisdiction (*Norton v. Larney*, 266 U. S. 511, 515).

A. The Fact That There Are Two Grounds Alleged in Support of Plaintiffs' Claim or Cause of Action, One of Which May Not Present a Federal Question, Does Not Deprive the Court of Jurisdiction.

In the complaint for declaratory relief herein the termination of the venture agreement is predicated on two bases, (1) the possible invalidity of the agreement under the anti-trust laws and (2) the provisions of the termina-

tion agreement. We may assume that situation (2) above does not present a federal question. This does not deprive the court of jurisdiction but on the contrary, being so closely allied with the federal question presented, the court has jurisdiction to determine (2) even though it omits to decide the question covered in (1), *supra*. In *Southern Pacific Co. v. Van Hoosear*, 72 F. 2d 903 (C. C. A. 9), Judge Mack, sitting in the Ninth Circuit, in passing upon a similar question, said at page 911:

“Federal jurisdiction was based upon the federal question presented by an action to recover rates established under the Interstate Commerce Act (49 U. S. C. A., §1 *et seq.*). When the intrastate character of the commerce was determined either as *res adjudicata* or as established by the evidence, no federal question remained in the case; jurisdiction to give judgment for the intrastate rates must therefore be upon the principle that the existence of a substantial federal question gave the federal court ‘the right to decide all the questions in the case, even though it decided the Federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only.’ ”

The often cited case of *Hurn v. Oursler*, 289 U. S. 238, contains a similar statement (p. 246):

“The distinction to be observed is between a case where two distinct grounds in support of a single cause of action are alleged, one only of which presents a federal question, and a case where two separate and

distinct causes of action are alleged, one only of which is federal in character. In the former, where the federal question averred is not plainly wanting in substance, the federal court, even though the federal ground be not established, may nevertheless retain and dispose of the case upon the non-federal *ground*; in the latter it may not do so upon the non-federal *cause of action*.” (Italics by Court.)

Another similar holding is *Siler v. Louisville & N. R. Co.*, 213 U. S. 175, 191.

We submit that in the instant case the court had jurisdiction to determine the controversy either upon the ground of the existence of a federal question or upon the ground of a non-federal question closely allied with the federal question, or upon both grounds.

The fact that the District Judge at times expressed doubt as to the existence of jurisdiction has no more significance than the ruminations of any court in arriving at the solution of a problem. The opinions of a court during the course of proceedings before it or at the conclusion of them may be consistent, contradictory, clear or confused. However, the formal order, decree or judgment is the instrument representing the Judge's decision. (*Rothschild & Co. v. Marshall*, 44 F. 2d 546, 548 (C. C. A. 9).)

To charge, as appellants have done, that Judge Ben Harrison continued in force a receivership with the knowledge that he had no jurisdiction to act is to impute unwarrantedly to a distinguished judge a wilful violation of his oath of office.

II.

If It Be Held That Plaintiffs' Complaint Defectively Alleges Jurisdiction, Appellees Request Leave to Amend Said Complaint.

Authority is given by the revision of the Judicial Code to amend defective allegations of jurisdiction in appellate courts. 28 U. S. C., §1653, states:

“Amendment of Pleadings to Show Jurisdiction.

“Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.”

Even before the enactment of the above provision the Supreme Court in *Norton v. Larney*, 266 U. S. 511, 516, held that it had the power in effect to amend a bill in equity to supply lacking allegations of jurisdiction and to show the existence of a federal question. In the cited case the court, noting that jurisdiction appeared from the entire record, considered the bill in equity as amended to conform to the facts and sustained the jurisdiction of the lower court.

In *Keene Lumber Co. v. Leventhal*, 165 F. 2d 815, 818 (C. C. A. 1), the Court of Appeals held that it had power to permit a party on appeal to amend his complaint so as to allege jurisdictional facts which were absent in his original pleading. The court there proceeded under the authority of 28 U. S. C., §399, which permitted missing allegations to be supplied by amendment to show jurisdiction at any stage of the proceedings in diversity cases.

“§399. Amendments to show diverse citizenship. Where, in any suit brought in or removed from any State court to any district of the United States, the

jurisdiction of the district court is based upon the diverse citizenship of the parties, and such diverse citizenship in fact existed at the time the suit was brought or removed, though defectively alleged, either party may amend at any stage of the proceedings and in the appellate court upon such terms as the court may impose, so as to show on the record such diverse citizenship and jurisdiction, and thereupon such suit shall be proceeded with the same as though the diverse citizenship had been fully and correctly pleaded at the inception of the suit, or, if it be a removed case, in the petition for removal. (Mar. 3, 1915, c. 90, 38 Stat. 956.)”

This right has been expanded to include not only diversity cases but all other cases by 28 U. S. C., §1653, set forth above. However, as pointed out in *Norton v. Larney*, *supra*, curative amendment to show jurisdiction based upon the existence of a federal question was countenanced by the Supreme Court even before express statutory sanction was given for such procedure.

In the event permission were given to amend plaintiffs' complaint, plaintiffs' amended pleading would be in the form submitted in Appendix B.

The defective allegations of jurisdiction, if they be defective, are amended in the proposed pleading, Appendix B, merely by the deletion of certain portions of the original complaint, nothing has been added.

The proposed amended complaint has been prepared by the deletion of paragraphs II, III, VII, VIII, X and a portion of XII of the complaint as originally filed by plaintiffs.

Such amended pleading would relate back to the date of the original pleading under the terms of Rule 15c, Federal Rules of Civil Procedure, which provides as follows:

“c. Relation Back of Amendments.

“Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.”

The result of the holdings in both *Norton v. Larney, supra*, and *Keene Lumber Co. v. Leventhal, supra*, is that the amended pleading related back to the date of the original pleading.

Appellants cannot claim surprise or prejudice in opposition to such amendment for the reason that the theory under which jurisdiction was vested in the District Court was clearly announced by plaintiffs' counsel at the hearing on September 10, 1947, as indicated by the excerpts from the transcript of the proceedings set forth at page 6 of our brief [R. 108, 110].

We submit that if the court construe the complaint herein as defectively alleging jurisdiction this is a proper case for leave to amend, for the reason among others that appellants not only acquiesced in the acts of the receiver but gave affirmative approval to his conduct.

Appellants waited eighteen months before they sought a review of the question of whether the District Court had jurisdiction. The receiver was appointed by order dated July 7, 1947, which order was an appealable one.

26 U. S. C., §1292:

“The courts of appeal shall have jurisdiction of appeals from:

* * * * *

“(2) Interlocutory orders appointing receivers,
* * *.”

If plaintiffs were not satisfied with the remedy of appeal, the court’s jurisdiction could have been challenged by an application for a writ of prohibition.

In the Matter of the State of New York, 256 U. S. 490.

See:

Savage v. United States District Court, 144 F. 2d 575 (C. C. A. 9).

In fact, appellants’ counsel recognized the propriety of the appointment of the receiver on or about February 26, 1948, when they approved a wage agreement, pertaining to certain of the employees of the Alto Theatre, that the receiver had entered into with the Projectionists Union [R. 51]. Over the signature of defendants’ counsel, who are now appellants’ counsel, the following statement appears:

“Petition is hereby presented to this Honorable Court for approval of the wage scale and working agreement executed between the Moving Picture Projectionists Local No. 150, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, and the Alto Theater, through Frank Millan, Receiver for the same, duly appointed by order of this

Court, which agreement was executed February 4, 1948.

“The agreement provides for an increase in wage scales and is the same generally as executed by other theaters in this area.

“The agreement has been examined by William Gamble, of the Law Firm of Macfarlane, Schaefer & Haun, attorneys for defendants, and by Edward J. O'Connor, of the Law Firm of O'Connor & O'Connor, attorneys for the Receiver, Frank Millan. The Agreement, which is attached to and made a part of this petition, is approved.

MACFARLANE, SCHAEFER & HAUN

By WILLIAM GAMBLE

Attorneys for Defendants

O'CONNOR & O'CONNOR

By EDWARD J. O'CONNOR

Attorneys for Receiver

“The same is hereby approved:

BEN HARRISON

United States District Judge.”

[R. 51.] (Emphasis added.)

At that time we must assume, through the acts of their counsel, that defendants were approving the carrying on of the business of the Alto Theatre by the receiver and in fact it appears that defendants' attorneys recognized the receiver to be “duly appointed by order of this court.”

While we are aware that there are statements in opinions to the effect that where jurisdiction is lacking a receiver's expenses cannot be charged to the receivership fund, the cases cited by appellants do not indicate that

any elements of acquiescence were there present. For instance in *Noxon Chemical Products Co. v. Leckie*, 39 F. 2d 318 (C. C. A. 3), cited at page 19 of appellants' brief, the court said at page 319:

"Without elaboration of the facts set forth in our former opinion, on which the judgment therein was based, an examination of the record discloses with clearness that no subsequent act of the corporation could in any way be construed as an approval or ratification of the proceedings, by which its property was wrested from it, without notice or an opportunity to be heard."

In *Finneran v. Burton*, 291 Fed. 37 (C. C. A. 8), cited at page 19 of appellants' brief, the following statement appears in the court's opinion at page 39, referring to a receivership of the Appliance Company:

"It must always be kept in mind that the situation here is one in which there was no voluntary act on the part of the Appliance Company, its officers or directors, from which it could be claimed that they had voluntarily agreed to the receivership in the state court."

In *Burnrite Coal Briquette Co. v. Riggs*, 6 F. 2d 226 (C. C. A. 3), the court stated that even in a situation where a receiver was appointed without jurisdiction his expenses could properly be charged to the receivership funds where acquiescence in the receiver's acts existed on the part of those claiming the court was without jurisdiction. When the case reached the Supreme Court, *Burnrite Coal Briquette Co. v. Riggs*, 274 U. S. 208, it was held that the lower court had jurisdiction to appoint the receiver and the question was left open of whether the expenses of a receivership might be charged to the re-

ceivership property where jurisdiction was lacking to appoint the receiver. Mr. Justice Brandeis, speaking for the court, said at page 214:

“We have no occasion to determine whether a Federal district court which appoints a receiver in a case in which it necessarily lacks jurisdiction of the subject-matter, so that jurisdiction cannot be acquired by acquiescence, may nevertheless impose upon the corporation, because of acquiescence, the usual charges incident to a receivership.”

Irrespective of the question of what the proper rule of law is with regard to charging receiver's expenses against receivership funds where no jurisdiction exists to appoint a receiver, the fact that appellants affirmatively approved the receiver's acts presents a strong reason for permitting plaintiff's complaint to be amended if such amendment is necessary in order to show jurisdiction.

Conclusion.

We submit that this is a clear case of the existence of jurisdiction in the District Court. Jurisdiction existing the court had authority to appoint the receiver and his expenses, fees and expenses of his attorney were accordingly a proper charge against the receivership funds.

The judgment of the District Court should be affirmed.

Respectfully submitted,

GURNEY E. NEWLIN,

CLYDE E. HOLLEY,

GEORGE W. TACKABURY,

FRANK R. JOHNSTON,

NEWLIN, HOLLEY, SANDMEYER & TACKABURY,

Attorneys for Appellees.



APPENDIX A.

COMPLAINT FOR DECLARATORY RELIEF.

Plaintiffs above named complain of the above named defendants as follows:

I.

The matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars (\$3,000.00), and arises under the laws of the United States, to-wit: Section 1 of the Act of Congress of July 2, 1890, 15 U. S. C. A. sec. 4, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act.

II.

At all times herein mentioned, plaintiff, United West Coast Theatres Corporation, has been and is now a California corporation with its principal place of business in the County of Los Angeles, State of California, and plaintiff, Fox West Coast Agency Corporation, has been and now is a Delaware corporation doing business in the County of Los Angeles, State of California.

III.

At all times herein mentioned, defendant, South Side Theatres, Inc. has been and now is a California corporation with its principal place of business in the County of Los Angeles, State of California, and defendant, South Side Associates has been and is a joint venture by and between Marco Wolff, Fanchon Simon, Roy N. Wolff and Rube Wolff, each of whom are residents of the County of Los Angeles, State of California.

IV.

Plaintiff, United West Coast Theatres Corporation, at all times mentioned herein has been and now is the lessee of the premises known as the Fifth Avenue Theatre Building in which is located the "Fifth Avenue Theatre" at 2541 West Manchester Boulevard, Inglewood, California.

V.

Defendant, South Side Theatres, Inc. at all times mentioned herein has been and now is the owner of the premises known as the Alto Theatre Building in which is located the "Alto Theatre" at 8862 South Western Avenue, Los Angeles, California.

VI.

On or about April 1, 1941, plaintiffs entered into a written agreement with defendant, South Side Theatres, Inc., pursuant to which the Fifth Avenue and Alto theatres and the buildings in which said theatres respectively are located, were to be operated by plaintiffs and said defendant as a joint venture to be known and designated as the "Fifth Avenue and Alto Theatres Venture" for a term of ten (10) years beginning April 1, 1941 and ending March 31, 1951 and pursuant to which agreement, plaintiff, United West Coast Theatres Corporation, became entitled to fifty-one per cent (51%) of the proceeds of said joint venture and became liable for fifty one-per cent (51%) of the losses of said joint venture and the defendant, South Side Theatres, Inc., became entitled to forty-nine per cent (49%) of the profits of said joint venture and liable for forty-nine per cent (49%) of the losses of said joint venture. Said agreement, made on or about April 1, 1941, also provided for the employment of plaintiff, Fox West Coast Agency Corporation, to generally supervise the business of the venture for which services

Fox West Coast Agency Corporation was to receive weekly compensation equal to five and one-fourth per cent (5¼%) of the weekly gross receipts of the venture (exclusive of admission taxes or other like taxes on admissions).

VII.

On or about April 1, 1941 plaintiffs and defendant, South Side Theatres, Inc., entered into a written agreement providing for the termination of the "Fifth Avenue and Alto Theatres Venture" upon the happening of certain events. A true and correct copy of said agreement is attached hereto, made a part hereof, and marked Exhibit A. Among the events set forth in said agreement, the happening of which would give any part to said agreement the right to terminate, was and is the entry of a Decree in an action brought by the United States of America against any party or parties to said agreement requiring and directing such party or parties to terminate or nullify said venture agreement or the effect of which would be to subject any of the parties thereto to any penalty or damage on account thereof or anything done thereunder. For convenience the agreement pursuant to which the venture was created will hereinafter be referred to as "the venture agreement" and the agreement pursuant to which the venture may be terminated will hereinafter be referred to as "the termination agreement."

VIII.

On or about March 1, 1944, defendant South Side Theatres, Inc. sold, transferred, conveyed and assigned to defendant, South Side Associates all of its right, title and interest in, to and under the venture agreement, reserving, however, to said South Side Theatres, Inc. all

of its then interest in the real property comprising the Alto Theatre Building.

IX.

On June 11, 1946 a Special Expediting Court convened under the authority of the Expediting Act of February 11, 1903 (15 U. S. C. A. sec. 29), sitting as the United States District Court for the Southern District of New York in the matter of United States of America, plaintiff, against Paramount Pictures, Inc., et al., defendants, Equity Number 87-273, filed an Opinion in which the court indicated that certain agreements between owners of two or more theatres normally in competition were illegal and the court further stated that "Even if the parties to such combinations were not major film producers and distributors, but were wholly independent exhibitors, such agreements might often be regarded as beyond the reasonable limits of restraint allowance under the Sherman Act." On December 31, 1946 said court filed its Findings of Fact, including, among other findings, Number 113, as follows: "Other forms of operating agreements are between major defendants and independent exhibitors rather than between major defendants. The effect is to ally two or more theatres of different ownership into a coalition for the nullification of competition between them and for their more effective competition against theatres not members of the 'pool.'" On the same date, December 31, 1946, said court entered a Decree enjoining and restraining certain of the defendants in said action, including Twentieth Century-Fox

Film Corporation and National Theatres Corporation (sometimes erroneously referred to in said Decree as "National Theatres, Inc.". "From making or continuing to perform pooling agreements whereby given theatres of two or more exhibitors normally in competition are operated as a unit or whereby the business policies of such exhibitors are collectively determined by a joint committee or by one of the exhibitors or whereby profits of the 'pooled' theatres are divided among the owners according to prearranged percentages." The above quoted provisions of said Decree became effective July 1, 1947.

X.

The plaintiffs herein are subsidiaries of Twentieth Century-Fox Film Corporation and National Theatres Corporation, two of the defendants so enjoined and restrained. Plaintiffs are informed and believe and, therefore, allege that said venture agreement is an agreement, the performance of which is enjoined and restrained by said Decree from and after June 30, 1947. Plaintiffs fear that if they continue, through said venture or otherwise, to operate said Alto Theatre after June 30, 1947, they will violate the terms of the Decree referred to earlier in this paragraph and will be in contempt of the court making said Decree and will be subjected to penalties therefor.

XI.

The venture agreement is a written contract in which plaintiffs are interested and with reference to which plaintiffs desire a declaration with respect to the rights or liabilities of plaintiffs and defendants.

XII.

An actual controversy relating to the legal rights and liabilities of plaintiffs and defendants exists and arises out of the following facts:

On or about June 10, 1947, plaintiffs served upon defendants a notice of their intention to terminate the venture agreement by reason of the happening of certain of the events specified in the termination agreement and the provisions of the Decree in the matter of *United States v. Paramount Pictures, Inc., et al.* A true and correct copy of said notice is attached hereto, and made part hereof and marked Exhibit B.

On or about June 30, 1947, plaintiffs served upon defendants a notice terminating said venture agreement, a true and correct copy of which is attached hereto, made part hereof and marked Exhibit C. *Plaintiffs contend that by reason of the provisions of the termination agreement and by reason of the provisions of the Decree in United States v. Paramount Pictures, Inc., et al., plaintiffs are no longer obliged to and are no longer legally permitted to perform the venture agreement and that performance of the venture agreement has been rendered impossible and terminated by operation of law.*

Defendants contend that regardless of said Decree plaintiffs are still bound by said venture agreement and required to perform the same in accordance with its terms.

XIII.

Defendant, South Side Theatres, Inc., is the owner of the Alto Theatre Building and the Alto Theatre located therein, referred to in paragraph V hereinabove and for some time last past said "Fifth Avenue and Alto Theatre Venture" has been operating said theatre. On June 30, 1947, plaintiffs tendered the possession of said theatre to defendants and requested them to operate the same. Defendants refuse to accept possession of said theatre and refuse to operate the same. Said theatre is now closed and will remain dark from and after June 30, 1947. Said theatre operation has been very profitable, the average weekly profits therefrom having been approximately five hundred dollars (\$500.00). In the event that said theatre premises be not operated and said theatre remain dark, not only will the anticipated profits from said operation have been lost but future profits be impaired by reason of the adverse effect upon the community which patronizes said theatre and irreparable damage to the operations of said theatre will result. The "Fifth Avenue and Alto Theatres Venture," 1609 West Washington Boulevard, Los Angeles, California (telephone REpublic 4111), although having tendered possession to South Side Theatres, Inc. and South Side Associates of the real and personal property comprising the Alto Theatre Building, including the Alto Theatre located therein, for which a receiver is herein requested, is now in actual possession of the same. The parties entitled to possession of said real and personal property are South Side Theatres, Inc., and South Side Associates, 6838 Hollywood Boulevard, Hollywood, California (telephone HEMpstead 3263).

Wherefore, plaintiffs pray judgment as follows:

1. *That the venture agreement be declared to be terminated and is of no further force or effect.*

2. *That it be decreed that plaintiffs are no longer bound to perform the venture agreement or any part thereof.*

3. *That the court declare such other rights or duties as may be necessary or proper with relation to said agreement between plaintiffs and defendants.*

4. *That a receiver be appointed upon the filing of this complaint and permanently thereafter to take charge of said Alto Theatre Building, including the Alto Theatre located therein, and to operate the theatre business conducted in said theatre.*

5. *That an order to show cause be issued herein requiring the defendants to appear before this court upon a day fixed by said court, then and there to show cause why the appointment of a receiver herein should not be made permanent.*

6. *That the court give such further relief, equitable or otherwise, as the court deems proper and necessary in the premises.*

7. *For plaintiffs costs herein incurred.*

APPENDIX B.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

Civil Action No. 7282-BH

UNITED WEST COAST THEATRES CORPORATION and FOX
WEST COAST AGENCY CORPORATION,

Plaintiffs,

vs.

SOUTH SIDE THEATRES, INC., and MARCO WOLFF, FANCHON SIMON, ROY N. WOLFF and RUBE WOLFF, Joint Venturers, Doing Business Under the Name of SOUTH SIDE ASSOCIATES,

Defendants.

AMENDED COMPLAINT FOR DECLARATORY RELIEF.

Plaintiffs above named complain of the above named defendants as follows:

I.

The matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars (\$3,000.00), and arises under the laws of the United States, to-wit: Section 1 of the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act.

II.

Plaintiff, United West Coast Theatres Corporation, at all times mentioned herein has been and now is the lessee of the premises known as the Fifth Avenue Theatre Building in which is located the "Fifth Avenue Theatre" at 2541 West Manchester Boulevard, Inglewood, California.

III.

Defendant, South Side Theatres, Inc., at all times mentioned herein has been and now is the owner of the premises known as the Alto Theatre Building in which is located the "Alto Theatre" at 8862 South Western Avenue, Los Angeles, California.

IV.

On or about April 1, 1941, plaintiffs entered into a written agreement with defendant, South Side Theatres, Inc., pursuant to which the Fifth Avenue and Alto theatres and the buildings in which said theatres respectively are located, were to be operated by plaintiffs and said defendant as a joint venture to be known and designated as the "Fifth Avenue and Alto Theatres Venture" for a term of ten (10) years beginning April 1, 1941 and ending March 31, 1951, and pursuant to which agreement, plaintiff, United West Coast Theatres Corporation, became entitled to fifty-one per cent (51%) of the proceeds of said joint venture and became liable for fifty-one per cent (51%) of the losses of said joint venture and the defendant, South Side Theatres, Inc., became entitled to forty-nine per cent (49%) of the profits of said joint venture and liable for forty-nine per cent (49%) of the losses of said joint venture. Said agreement, made on or

about April 1, 1941, also provided for the employment of plaintiff, Fox West Coast Agency Corporation, to generally supervise the business of the venture for which services Fox West Coast Agency Corporation was to receive weekly compensation equal to five and one-fourth per cent ($5\frac{1}{4}\%$) of the weekly gross receipts of the venture (exclusive of admission taxes or other like taxes on admissions).

V.

On June 11, 1946 a Special Expediting Court convened under the authority of the Expediting Act of February 11, 1903 (15 U. S. C. A. sec. 29), sitting as the United States District Court for the Southern District of New York in the matter of United States of America, plaintiff, against Paramount Pictures, Inc., *et al.*, defendants, Equity Number 87-273, filed an Opinion in which the court indicated that certain agreements between owners of two or more theatres normally in competition were illegal and the court further stated that "even if the parties to such combinations were not major film producers and distributors, but were wholly independent exhibitors, such agreements might often be regarded as beyond the reasonable limits of restraint allowance under the Sherman Act." On December 31, 1946 said court filed its Findings of Fact, including among other findings, Number 113, as follows: "Other forms of operating agreements are between major defendants and independent exhibitors rather than between major defendants. The effect is to ally two or more theatres of different ownership into a coalition for the nullification of competition between them and for their more effective competition against theatres not members of the 'pool.'" On the same date, December

31, 1946, said court entered a Decree enjoining and restraining certain of the defendants in said action, including Twentieth Century-Fox Film Corporation and National Theatres Corporation (sometimes erroneously referred to in said Decree as "National Theatres, Inc.") "From making or continuing to perform pooling agreements whereby given theatres of two or more exhibitors normally in competition are operated as a unit or whereby the business policies of such exhibitors are collectively determined by a joint committee or by one of the exhibitors or whereby profits of the 'pooled' theatres are divided among the owners according to prearranged percentages." The above quoted provisions of said Decree became effective July 1, 1947.

VI.

The venture agreement is a written contract in which plaintiffs are interested and with reference to which plaintiffs desire a declaration with respect to the rights or liabilities of plaintiffs and defendants.

VII.

An actual controversy relating to the legal rights and liabilities of plaintiffs and defendants exists and arises out of the following facts:

Plaintiffs contend that by reason of the provisions of the Decree in *United States vs. Paramount Pictures, Inc., et al.*, plaintiffs are no longer obliged to and are no longer legally permitted to perform the venture agreement and that performance of the venture agreement has been rendered impossible and terminated by operation of law.

Defendants contend that regardless of said Decree plaintiffs are still bound by said venture agreement and required to perform the same in accordance with its terms.

VIII.

Defendant, South Side Theatres, Inc., is the owner of the Alto Theatre Building and the Alto Theatre located therein, referred to in paragraph III hereinabove and for some time last past said "Fifth Avenue Alto Theatre Venture" has been operating said theatre. On June 30, 1947 plaintiffs tendered the possession of said theatre to defendant and requested them to operate the same. Defendants refuse to accept possession of said theatre and refuse to operate the same. Said theatre is now closed and will remain dark from and after June 30, 1947. Said theatre operation has been very profitable, the average weekly profits therefrom having been approximately five hundred dollars (\$500.00). In the event that said theatre premises be not operated and said theatre remain dark, not only will the anticipated profits from said operation have been lost but future profits will be impaired by reason of the adverse effect upon the community which patronizes said theatre and irreparable damage to the operations of said theatre will result. The "Fifth Avenue and Alto Theatres Venture," 1609 West Washington Boulevard, Los Angeles, California (telephone Republic 4111), although having tendered possession to South Side Theatres, Inc., and South Side Associates of the real and personal property comprising the Alto Theatre Building, including the Alto Theatre located therein, for which a receiver is herein requested, is now in actual possession of the same. The parties entitled to possession of said real and personal property are South Side Theatres, Inc., and South Side Associates, 6838 Hollywood Boulevard, Hollywood, California (telephone Hempstead 3263).

Wherefore, plaintiffs pray judgment as follows:

1. That the venture agreement be declared to be terminated and is of no further force or effect.
2. That it is decreed that plaintiffs are no longer bound to perform the venture agreement or any part thereof.
3. That the court declare such other rights or duties as may be necessary or proper with relation to said agreement between plaintiffs and defendants.
4. That a receiver be appointed upon the filing of this complaint and permanently thereafter to take charge of said Alto Theatre Building, including the Alto Theatre located therein, and to operate the theatre business conducted in said theatre.
5. That an order to show cause be issued herein requiring the defendants to appear before this court upon a day fixed by said court, then and there to show cause why the appointment of a receiver herein should not be made permanent.
6. That the court give such further relief, equitable or otherwise, as the court deems proper and necessary in the premises.
7. For plaintiffs' costs herein incurred.

NEWLIN, HOLLEY, SANDMEYER & TACKABURY,

By FRANK R. JOHNSTON,

Attorneys for Plaintiffs.

No. 12165

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SOUTH SIDE THEATRES, INC., *et al.*,

Appellants,

vs.

UNITED WEST COAST THEATRES CORPORATION, *et al.*,

Appellees.

APPELLANTS' REPLY BRIEF.

MACFARLANE, SCHAEFER & HAUN,

HENRY SCHAEFER, JR.,

WILLIAM P. GAMBLE,

JAMES H. ARTHUR,

1150 Subway Terminal Building, Los Angeles 13,

Attorneys for Appellants.

FILED

RUSSELL HARDY,

MAY 26 1949

Of Counsel.

PAUL P. O'BRIEN,
CLERK



TOPICAL INDEX

	PAGE
Foreword	1
I.	
The appellees have not shown that a federal question exists which would give the District Court jurisdiction.....	1
II.	
Plaintiff cannot now request to amend its complaint in order to confer jurisdiction upon the court and thus relieve itself from the liability of costs and charges of the receivership when the receivership is now terminated.....	5

TABLE OF AUTHORITIES CITED

CASES	PAGE
Boston & M. Consol. Copper & S. Min. Co. v. Mont. Ore Purchasing Co., 188 U. S. 632, 47 L. Ed. 626.....	2
General Investment Co. v. N. Y. C. R. Co., 271 U. S. 228, 70 L. Ed. 920.....	2
Norton v. Larney, 266 U. S. 511, 69 L. Ed. 413.....	3
Rambush Dec. Co. v. Brotherhood of Painters, etc., 105 F. 2d 134	1
Tennessee v. Union & Planters' Bank, 152 U. S. 454, 38 L. Ed. 511	2

No. 12165

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SOUTH SIDE THEATRES, INC., *et al.*,

Appellants,

vs.

UNITED WEST COAST THEATRES CORPORATION, *et al.*,

Appellees.

APPELLANTS' REPLY BRIEF.

Foreword.

Appellants have no desire to reargue matters set forth in their Opening Brief but confine this brief to reply to certain matters set forth in Appellees' Brief.

I.

The Appellees Have Not Shown That a Federal Question Exists Which Would Give the District Court Jurisdiction.

Appellees have cited cases in their argument under Point I which, it is argued, sustain the jurisdiction of the District Court by reason of the existence of a Federal question. In *Rambush Dec. Co. v. Brotherhood of Painters, etc.*, 105 F. 2d 134 (C. C. A. 2), in which the plaintiff brought an action for declaratory relief on the grounds that the contract was in violation of the anti-trust laws and was an unlawful restraint of interstate trade, the

court rightfully held that the complaint presented a Federal question adequate to give the District Court jurisdiction. There can be no argument with this case as the complaint specifically alleged the contract to be in violation of the Federal laws.

The court has universally held that if the plaintiff asserts a right which will be sustained by one construction of a Federal law or defeated by another, the case is one arising under Federal law and the District Court thus has jurisdiction. See:

Tennessee v. Union & Planters' Bank, 152 U. S. 454, 38 L. Ed. 511;

Boston & M. Consol. Copper & S. Min. Co. v. Mont. Ore Purchasing Co., 188 U. S. 632, 47 L. Ed. 626.

In *General Investment Co. v. N. Y. C. R. Co.*, 271 U. S. 228, 70 L. Ed. 920, cited by Appellees, the court states:

“In the bill, as we have shown, the plaintiff attempts with much detail to set forth a continuing violation of the Sherman Anti-Trust Act and the Clayton Act, asserts that this violation unless restrained will be injurious to the plaintiff and other stockholders and prays for relief by injunction. Such a suit is essentially one arising under the laws of the United States, and, as the requisite value is involved, is one of which the District Courts are given jurisdiction.”

All the other cases cited by Appellants reiterate this proposition of law which is without question the rule for determining jurisdiction. Appellees, however, have failed to show that the complaint has an allegation sufficient to bring it within the rule announced by these cases. In

paragraph Twelfth of plaintiffs' complaint the basis of the controversy is stated:

“Plaintiffs contend that by reason of the provisions of the termination agreement and by reason of the provisions of the Decree in *United States v. Paramount Pictures, Inc., et al.*, plaintiffs are no longer obliged to and are no longer legally permitted to perform the venture agreement and that performance of the venture agreement has been rendered impossible and terminated by operation of law.”

As was stated in Appellants' Opening Brief, the only question presented by the complaint is an interpretation of the termination agreement in light of the Decree of the District Court in *United States v. Paramount Pictures, Inc., et al.*, as alleged in the complaint. It is not alleged that the agreement set forth in the complaint is in violation of any Federal law nor is the construction of any Federal law necessary for the determination of the controversy alleged to exist. The only question presented was an interpretation of the terms of the contract in light of a decision of a Federal court. Appellees have quoted the case of *Norton v. Larney*, 266 U. S. 511, 69 L. Ed. 413, to the effect that if the record dehors the complaint indicates a basis of jurisdiction the court is privileged to assume jurisdiction. It is difficult to understand how the Appellees could arrive at such a conclusion when the court states on page 515:

“It is quite true that the jurisdiction of a Federal court must affirmatively and distinctly appear, and cannot be helped by presumptions or by argumentative inferences drawn from the pleadings. If it does not thus appear by the allegations of the bill or complaint, the trial court, upon having its attention called to the defect, or upon discovering it, must

dismiss the case, unless the jurisdictional facts be supplied by amendment. But here no action was taken by that court and none was asked by appellant."

We submit that there is nothing either in or outside of the record to show any facts sufficient to confer jurisdiction on the Federal court which are not set forth in the complaint. The complaint alleges that by reason of the agreement the Appellees had a right to terminate the contract and by reason of the Decree of the Federal court it was necessary for them to terminate the operation of the theatres under the joint venture agreement. Appellees have not asked for nor brought into question any interpretation of the anti-trust laws of the United States. They have merely requested a declaration that they were excused from performance by reason of the terms of the contract or by reasons of the decree of a court. In either case the question would be determined by an interpretation of the contract in light of a decision holding such contracts to be invalid.

In the last paragraph on page 12 of Appellees' Brief, the Appellees have expressed themselves in a manner which we believe is unwarranted by our statement. We have not knowingly charged the Honorable District Judge with a wilful violation of his oath of office. We simply called to the Court's attention the record. We realize that the District Court has not passed on Appellants' motion to dismiss and that matter therefore is not before this Court to review, as there is no order to review. We take the position that there is no jurisdiction in the District Court for this action, and as we understand the law that matter may be raised at any time and we raise it specifically in connection with the matters from which we have appealed. We believed when we filed our brief, and we believe now, that the Court's comments are illuminat-

ing and that his reasoning is particularly apt. It is interesting to note that another District Judge held much the same views as Judge Harrison held. The record from page 100 to page 124 gives the full discussion of what transpired and the comments of the Court, and we think that it is important because the Court reasoned the matter aloud for the benefit of counsel, and we believe his reasoning to be correct, namely, that it was a matter for the State Court.

II.

Plaintiff Cannot Now Request to Amend Its Complaint in Order to Confer Jurisdiction Upon the Court and Thus Relieve Itself From the Liability of Costs and Charges of the Receivership When the Receivership Is Now Terminated.

From the commencement of the receivership until its termination, plaintiff made no effort or request to the trial court to amend its pleadings so as to confer jurisdiction upon the Federal court. Now, after the receivership has been terminated the Appellees request the Appellate Court to amend the pleadings in order to relieve them from the payment of costs of receivership which during its entire existence was operating under a void order of court. Further it is noted that in paragraph Seventh of the proposed amendment as set forth on page 12, Appendix A of Appellees' Brief it is stated:

“Plaintiffs contend that by reason of the provisions of the Decree in *United States v. Paramount Pictures, Inc., et al.*, plaintiffs are no longer obliged to and are no longer legally permitted to perform the venture agreement and that performance of the venture agreement has been rendered impossible and terminated by operation of law.”

The effect of this amendment is to eliminate the right to terminate by reason of the provisions of the agreement and places the right to terminate squarely on the interpretation of a Decree of another court. The effect of this amendment is neither to strengthen nor weaken the position as set forth in the original complaint nor can Appellees after approximately twenty months seek to amend their complaint in order to void charges which should be made against them by reason of their action in appointing a receiver in a court which was without jurisdiction.

The Appellees' attempt to avoid their responsibility by stating that the Appellants acquiesced in the appointment of the receiver. Appellees have apparently pointed out that on the initial return on order to show cause [R. 18] the Appellants raised the question of the jurisdiction of the court and continued to assert the lack of jurisdiction at every possible opportunity and that the Appellants made a motion to dismiss the action [R. 49] on the grounds that the court was without jurisdiction, which motion to dismiss has not been ruled upon by the trial court. Appellees attempt to show acquiescence by the approval by the attorneys for the Appellants of a working agreement between a union representing the theatre employees and the receiver. In order to keep the theatre operating and to prevent loss by all parties it was necessary that the wage agreement attached to the petition for approval be made. [R. 51 to 66.] There is nothing in the approval of the union contract which could be construed as an acquiescence in the receivership. Appellees cite no cases which support their contention that acts

done by Appellants could be construed as an approval or ratification of the receivership proceedings. The cases cited hold to the contrary.

It is respectfully submitted that the arguments of the Appellants in their Opening Brief and Reply have established that the court was without the jurisdiction to appoint a receiver and that his expenses, fees and expenses of his attorney were accordingly not a proper charge against receivership funds and should be borne by Appellees.

Respectfully submitted,

MACFARLANE, SCHAEFER & HAUN,
HENRY SCHAEFER, JR.,
WILLIAM P. GAMBLE,
JAMES H. ARTHUR,

Attorneys for Appellants.

RUSSELL HARDY,
Of Counsel.



No. 12165.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SOUTH SIDE THEATRES, INC., *et al.*,

Appellants,

vs.

UNITED WEST COAST THEATRES CORPORATION, *et al.*,

Appellees.

PETITION FOR REHEARING.

MACFARLANE, SCHAEFER & HAUN,

HENRY SCHAEFER, JR.,

WILLIAM P. GAMBLE,

JAMES H. ARTHUR,

1150 Subway Terminal Building, Los Angeles 13,

Attorneys for Appellants.

RUSSELL HARDY,
Of Counsel.

FILED

JAN 20 1950

PAUL P. O'BRIEN, \

TABLE OF AUTHORITIES CITED

CASES	PAGE
General Investment Co. v. N. Y. C. R. Co., 271 U. S. 228, 70 L. Ed. 920.....	4
Norton v. Larney, 266 U. S. 51, 69 L. Ed. 413.....	5
The Rambusch Decorating Co. v. Brotherhood of America, 105 F. 2d 134.....	4

No. 12165.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SOUTH SIDE THEATRES, INC., *et al.*,

Appellants,

vs.

UNITED WEST COAST THEATRES CORPORATION, *et al.*,

Appellees.

PETITION FOR REHEARING.

The Appellants respectfully present herewith their Petition for Rehearing on the grounds that the decision of the Court is based upon the proposition that the complaint raised the issue whether the venture agreement violated the Sherman Anti-Trust Act. This Court said that there was "a substantial controversy with reference to the validity of the joint venture agreement under the Sherman Act" and was an issue within the jurisdiction of the Court below. The Appellants contend that said issue was not raised by the allegations of the complaint and submit herewith their argument in support thereof as follows:

The complaint, alleged that that issue had been decided by the United States District Court for the Southern District of New York, and that the judgment of that Court in another case applied to and enjoined the performance of the agreement. No attack on the validity or application of that judgment was made by Appellees in the Court

below in this case. No allegations to the effect that the agreement was not violative of the Sherman Act, have been made or were intended by Appellees in the Court below. They have not contended in that Court nor in this Court, that the agreement was not unlawful, as decided by the New York Court, nor that it was not enjoined for that reason. In the Court below, they have not sought to renew and to relitigate that issue, nor to have that Court reconsider, review, reverse or affirm that judgment. At least formally, Appellees have accepted that judgment as valid, applicable, conclusive and final in this case.

That being so, what is the real issue raised by the complaint? While the complaint clearly eliminates any issue as to the legality of the agreement under the Sherman Act, it fails to show with any clarity what the real issue is. The definition of that issue, therefore, requires inference and deduction from very indefinite material. Appellees seem to ask the Court to decide what are the rights and liabilities of the parties under the contract as between themselves, accepting the contract as violative of the Sherman Act and validly enjoined. Another question, not so indefinitely stated, is whether Appellees are longer bound to perform the agreement.

The rights and liabilities of parties to a contract, especially one which has been held to be unlawful and has been enjoined, arise out of the general law and not from the Sherman Act nor from any other federal statute. The Sherman Act does not declare, as to contracts which it condemns, the rights of the parties as between themselves, especially after the contract has been condemned and enjoined. The question whether Appellees are longer bound to perform the agreement, has been conclusively and finally settled by the New York Court which entered the injunction. The Court below was, therefore, in effect necessa-

rily asked to reverse, affirm, modify or otherwise change that judgment. That was asking the Court below to exercise an appellate jurisdiction as to the judgment of the New York Court, or to treat that judgment as a legislative enactment, not based on the facts of the case tried and decided by the New York Court, but containing a general rule to be applied as a statute to original specific instances arising throughout the country.

If the Court below had jurisdiction because the case was one arising under the Sherman Act, that jurisdiction was as broad, complete and unlimited as that of the New York District Court in the case in which the judgment was entered. It was precisely the same jurisdiction as that of the New York Court, unaffected and unlimited by the fact that the New York Court had tried, decided, and entered a judgment in the case.

If the Court below had any jurisdiction at all in the case, that jurisdiction included the power and duty to reach a decision as an original proposition, independently of and unaffected by the fact that the New York District Court had dealt with the same subject and had enjoined the agreement. That jurisdiction would have included the right to reach an opposite decision, and included the corollary authority to enter a judgment in effect authorizing the Appellees to disregard and disobey the judgment of the New York Court.

Such a jurisdiction would produce chaos in the administration of the antitrust laws by the courts and by the Department of Justice, and would effectually nullify injunctions against monopoly and restraint of trade practices and conditions, which usually extend throughout very wide areas of the country and are not confined to one judicial district. Such would be the effect with regard to

the judgment involved here, because it undertakes to end monopoly practices and conditions by a system of uniform injunctive provisions nationwide in scope. Such a jurisdiction could produce as many variations in the enforcement of and as many exceptions to, and exemptions from, the judgment of the New York Court as there are federal judicial districts in the United States. Enjoined monopolizers would not hesitate to exploit that opportunity.

The complaint did not even involve a controversy respecting the validity, construction and effect of the judgment of the New York Court. If it had involved such a question, that might have been a question involving the validity, construction and effect of the Sherman Act. But that question, if involved in this case, was in its very nature an appellate question, and was not one arising within the original jurisdiction of the Court below. The important limitation in the jurisdiction statute is that the district court shall have ORIGINAL jurisdiction only.

It has not been the contention of the Appellants that a complaint questioning as an original proposition the validity of a contract under the antitrust laws as an unlawful restraint of trade, does not present a question within the jurisdiction of a District Court. In *The Rambusch Decorating Co. v. Brotherhood of America*, 105 F. 2d 134 (C. C. A. 2d), and *General Investment Co. v. N. Y. C. R. Co.*, 271 U. S. 228, 70 L. Ed. 920, cited by this Court and by Appellees, no judgment of a coordinate Court which had previously adjudicated the character of the contracts as violative of law, was involved, as was the fact in this case. Instead, in those cases the complaint set forth facts

showing unlawful conduct, and the Court was asked to decide as to its validity, as an original independent question in the exercise of original jurisdiction.

Jurisdiction must affirmatively and distinctly appear in the pleadings. In *Norton v. Larney*, 266 U. S. 51, 69 L. Ed. 413, it was held that presumptions or argumentative inferences drawn from the pleadings, may not be the basis of jurisdiction. It would follow that the basis of jurisdiction may not be found in an interpretation of the pleadings in an argument on a motion to dismiss.

It will be noted from the complaint [R. 2] that in paragraph I the Appellees set forth the grounds upon which they claim jurisdiction is based; but in the statement of the claim upon which the pleader is entitled to relief, there is no reference to the Sherman Act, except a quotation from the opinion of the New York Court found in paragraph IX of the complaint [R. 5]. There is no allegation that the Appellees contend that the contract is in violation of the Sherman Act. There is no allegation by inference or otherwise that the contract is claimed by Appellees to be illegal under the Sherman Act.

In the demand for relief the Appellees make no claim that the contract is illegal or otherwise. In fact, they raise no issue as to its legality or illegality in any respect whatsoever.

The Appellants respectfully request that the Court reconsider its opinion in this case; for to uphold the complaint in this case would be to have federal jurisdiction depend on mere formal allegations that the controversy

arises under the laws of the United States, in any complaint whose specific allegations and specific prayers not only make no reference nor statement to a subject to which any law of the United States is applicable, but show the contrary to be true.

Respectfully submitted,

MACFARLANE, SCHAEFER & HAUN,
HENRY SCHAEFER, JR.,
WILLIAM P. GAMBLE,
JAMES H. ARTHUR,

By HENRY SCHAEFER, JR.,
Attorneys for Appellants.

RUSSELL HARDY,
Of Counsel.

Certificate of Counsel.

It is hereby certified by counsel for the Appellants that in our judgment the Petition submitted herewith is well founded and is not interposed for delay.

HENRY SCHAEFER, JR.

No. 12,166

IN THE

United States Court of Appeals
For the Ninth Circuit

BASIL BANGHART,

Appellant,

VS.

E. B. SWOPE, Warden, United States
Penitentiary, Alcatraz Island, Cali-
fornia,

Appellee.

BRIEF FOR APPELLEE.

FRANK J. HENNESSY,

United States Attorney,

JOSEPH KARESH,

Assistant United States Attorney,

Post Office Building, San Francisco 1, California,

Attorneys for Appellee.

FILED

APR -1 1949

PAUL P. O'BRIEN,



Subject Index

	Page
Jurisdictional Statement	1
Facts of the Case.....	2
Question Involved	3
The Judgment and Sentence.....	3
Argument	4
Conclusion	7

Table of Authorities Cited

Cases	Pages
Harrison v. Snook, Warden, (CCA-5) 22 Fed. (2d) 169.....	5
Hunter v. Martin, decided May 24, 1948, 334 U.S. 302.....	6
In re Wright, 51 Fed. Supp. 639.....	6
Johnston v. Wright, (CCA-9) 137 Fed. (2d) 914.....	6
Mahoney v. Johnston, (CCA-9) 144 Fed. (2d) 663.....	5, 6
McNally v. Hill, 293 U.S. 131.....	6

Statutes

18 U.S.C.A., Section 753 (f)	5
28 U.S.C.A., Sections 2241, 2243, 2253, 2255.....	1



No. 12,166

IN THE

**United States Court of Appeals
For the Ninth Circuit**

BASIL BANGHART,

Appellant,

VS.

E. B. SWOPE, Warden, United States
Penitentiary, Alcatraz Island, Cali-
fornia,

Appellee.

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

This is an appeal from an order of the United States District Court for the Northern District of California (hereinafter called the "court below"), denying appellant's petition for writ of habeas corpus (T. 46). The District Court had jurisdiction over the habeas corpus proceedings under Title 28 U.S.C.A. Sections 2241, 2243 and 2255. Jurisdiction to review the order of the District Court denying the petition is conferred upon this Honorable Court by Title 28 U.S.C.A. Section 2253.

FACTS OF THE CASE.

The appellant, an inmate of the United States Penitentiary at Alcatraz, California, filed a petition for a writ of habeas corpus in which he contended that the trial judge fixed his place of confinement as the Illinois State Penitentiary at Menard, Illinois, and that the Attorney General had no power to order his removal to the United States Penitentiary at Alcatraz, California, so long as his Illinois sentence was in full force and effect (T. 1-20). The Court below issued an order to show cause (T. 21). The appellee filed a return to the order to show cause (T. 22-23) and the appellant then filed a pleading entitled: "Traversing Respondent's Return to the Order to Show Cause" (T. 34-45). The matter was submitted, and the Court thereafter entered the following order denying the petition for writ of habeas corpus and dismissing the proceedings.

"Upon the filing of petitioner's petition for the writ of habeas corpus, the Court issued an order requiring the respondent to show cause why the writ should not issue. From the petition, respondent's return to the order to show cause and petitioner's traverse to the return, it is clear that no factual issue is tendered and that the petition may be determined on its face as a matter of law.

"The petitioner is now lawfully in the custody of the respondent and is not entitled to release from such custody. *Mahoney v. Johnston*, 9 Cir. 144 Fed. (2d) 663; *McNally v. Hill*, 293 U. S. 131.

“The petition is denied and the proceeding is dismissed.

Louis E. Goodman,
United States District Judge.

Dated: December 7, 1948.

(Indorsed:) Filed Dec. 7, 1948.

C. W. Calbreath, Clerk.”

From this order appellant now appeals to this Honorable Court (T. 47).

QUESTION INVOLVED.

Is the appellant now properly in the custody of the appellee?

THE JUDGMENT AND SENTENCE.

The pertinent portion of the judgment and sentence entered on May 15, 1934, in the Western District of North Carolina, Asheville Division, under which the appellant is now imprisoned in the United States Penitentiary at Alcatraz Island, California, reads as follows:

“**ORDERED AND ADJUDGED** that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of **FIVE YEARS** on Count No. 1, **TWENTY FIVE YEARS** on Count No. 2, **TWO YEARS** on Count No. 12, **TWO YEARS** on Count No. 3, **TWO YEARS** on Count

No. 4, these sentences to run consecutively making a total of THIRTY SIX YEARS.

“It appearing to the Court that the defendant, Banghart, is now under sentence from Cook County, State of Illinois, for a term of NINETY NINE years imposed by the State Court of Illinois, it is ordered that the defendant Banghart be returned to the custody of the Warden of the State Prison, at Menard, Illinois, for the completion of his sentence and that the above sentence is to run concurrently with the sentence of NINETY NINE YEARS.”¹ (T. 15-16.)

ARGUMENT.

Appellant contends, as above indicated, that the trial judge fixed the place of his confinement as the Illinois State Penitentiary at Menard, Illinois, and that the Attorney General had no power to order his removal to the United States Penitentiary at Alcatraz, California, so long as his Illinois sentence was in full force and effect, even though by his own admission he had escaped from the Illinois State Penitentiary at Joliet, Illinois, on October 9, 1942. There is no merit in this contention. It should be noted from the transfer order attached to the return to order to show cause (T. 29-30) that the Attorney General on January 2, 1943, directed that such transfer to the United States Penitentiary at Alcatraz be from the Illinois State Penitentiary at Joliet. It is thus apparent that

¹The sentence of thirty six years was on October 19, 1944, reduced to 31 years. (T. 31-32.)

such transfer was with the consent of the Illinois State officials; that the Attorney General desired the appellant to serve the balance of his Federal sentence in Alcatraz, a maximum security institution, rather than in an Illinois State Penitentiary from which he escaped is understandable. Under the applicable statute, 18 U.S.C.A. Section 753 (f),² the trial Court had power to designate the term of imprisonment and the type of institution in which the sentence was to be served but not the place of confinement. In fixing the time of imprisonment as concurrent with the State sentence, the trial Court did impose a condition which had the incidental effect of requiring that appellant serve his Federal sentence in the State penitentiary during the time that he was held by the State authorities, but the trial Judge did not have the power under Title 18 U.S.C.A. Section 753(f) to designate the State penitentiary as the only place of confinement for the duration of the Federal sentence.

Mahoney v. Johnston (CCA-9), 144 F. (2d) 663.

The case of *Harrison v. Snook, Warden* (CCA-5), 22 F. (2d) 169, upon which appellant relies, is inapplicable, for it involved a sentence imposed prior to the enactment of 18 U.S.C.A. Section 753 (f) in 1930, at a time when District Courts had power to designate a state penitentiary as the place of confinement. The release of appellant by the State authorities did not affect the term of his Federal sentence, and

²See Appendix.

upon such release the Attorney General under the statute had power to designate a Federal penitentiary as a place where appellant should serve the balance of his Federal sentence. The Alcatraz Record of Court Commitment shows that appellant's Federal sentence began to run on May 15, 1934, the date on which the trial Court originally imposed judgment. Appellant has not yet completed service of his sentence, which as above indicated was reduced from 36 years to 31 years. After he has served this sentence of 31 years, and the Illinois authorities exercise their detainer against him and take him into custody to complete the service of his 99 year state sentence, he can request credit on the state sentence for the time he served in Federal prison. That question is, however, one for the Illinois authorities and is not pertinent to these proceedings.

The holding in the case of *In re Wright*, 51 Fed. Supp. 639 (affirmed *Johnston v. Wright* (CCA-9), 137 Fed. (2d) 914), on which the appellant also relies, was overruled by the Supreme Court of the United States in *Hunter v. Martin*, decided May 24, 1948, 334 U. S. 302.

Thus, as the Court below stated in its order denying the petition for writ of habeas corpus, after citing *Mahoney v. Johnson*, supra, and *McNally v. Hill*, 293 U. S. 131, on which appellee herein also relies, the appellant is now lawfully in the custody of the appellee, and is not entitled to release from such custody.

CONCLUSION.

In view of the foregoing, it is respectfully urged that the order of the Court below is correct and should be affirmed.

Dated, San Francisco, California,
March 31, 1949.

FRANK J. HENNESSY,

United States Attorney,

JOSEPH KARESH,

Assistant United States Attorney,

Attorneys for Appellee.

(Appendix Follows.)



Appendix.

Appendix

Section 7 of the Act of May 14, 1930, C. 274, 46 Stat. 326 (18 U.S.C.A. 753 (f)), read as follows at the time of petitioner's conviction:

“All persons convicted of an offense against the United States shall be committed, for such terms of imprisonment and to such types of institutions¹ as the court may direct, to the custody of the Attorney General of the United States or his authorized representative, who shall designate the places of confinement where the sentences of all such persons shall be served. The Attorney General may designate any available, suitable, and appropriate institutions, whether maintained by the Federal Government or otherwise or whether within or without the judicial district in which convicted. The Attorney General is also authorized to order the transfer of any person held under authority of any United States statute from one institution to another if in his judgment it shall be for the well-being of the prisoner or relieve over-crowded or unhealthful conditions in the institution where such prisoner is confined or for other reasons. The authority conferred upon the Attorney General by this section shall extend to persons committed to the National Training Shool for Boys, by the juvenile court of the District of Columbia, as well as to those committed by any court of the United States.”

¹The phrase “and to such types of institutions” was deleted by the Act of June 14, 1941, C. 204, 55 Stat. 252. That act and the Act of October 21, 1941, C. 453, 55 Stat. 743, also amended Section 7 in other respects not material here. (See 18 U.S.C.A. Supp. III 753 (f)).

No. 12169

United States
Court of Appeals
for the Ninth Circuit

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY,

Appellant,

vs.

CLARA BROWN, a Minor, by Jesse J. Brown,
Her Guardian, ad litem,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the Southern District of California
Central Division

FILED

MAR 28 1949

PAUL P. O'DRIEN,
CLERK

No. 12169

United States
Court of Appeals

for the Ninth Circuit

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY,

Appellant,

vs.

CLARA BROWN, a Minor, by Jesse J. Brown,
Her Guardian, ad litem,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the Southern District of California
Central Division



INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Answer	20
Answer to Amended Complaint.....	27
Amended Complaint for Damages.....	22
Appeal:	
Certificate of Clerk to Transcript of Record on (SC)	18
Certificate of Clerk to Transcript of Record on (DC)	35
Designation of Points on (USCA).....	41
Notice of	31
Statement of Points on (DC)	32
Bond on Removal	12
Certificate of Clerk to Transcript of Record on Appeal (SC)	18
Certificate of Clerk to Transcript of Record on Appeal (DC)	35
Complaint for Damages	2
Designation of Points on Appeal (USCA).....	41

ii.

	PAGE
Minute Orders of Superior Court.....	15
Names and Addresses of Attorneys.....	1
Notice of Appeal	31
Notice of Hearing on Petition for Removal.....	7
Order Appointing Guardian Ad Litem.....	7
Order of Removal	16
Affidavit of Service of	17
Order Remanding Cause to State Court.....	30
Petition and Order for Appointment of Guardian Ad Litem	5
Petition for Removal	8
Statement of Points on Appeal (DC).....	32
Transcript of Proceedings	36

NAMES AND ADDRESSES OF ATTORNEYS:

For Appellant:

ROBERT W. WALKER,
J. H. CUMMINS,
J. B. KRAMER,

448 Santa Fe Building,
Los Angeles 14, Calif.

For Appellee:

CLAUDE A. WATSON,
EDWARD P. HART,

5937 Monterey Road,
Los Angeles 42, Calif.

and

SAMUEL P. YOUNG,

715 Black Bldg.,
357 S. Hill St.,
Los Angeles 13, Calif. [1*]

* Page numbering appearing at foot of page of original certified Transcript of Record.

In the Superior Court of the State of California
In and for the County of Los Angeles

No. 524754

CLARA BROWN, a minor, by Jesse J. Brown, her
guardian ad litem,

Plaintiff,

vs.

ATCHISON, TOPEKA & SANTA FE RAIL-
WAY CO., a corporation, T. F. ROBINSON,
John Doe, Jane Doe, and Doe Company, a cor-
poration,

Defendants,

COMPLAINT FOR DAMAGES
(Personal Injuries)

Plaintiff complains of defendants, and for cause
of action alleges as follows:

I.

That the above named Clara Brown is a minor
of the age of 15 years, and brings this action by and
through Jesse J. Brown, her guardian ad litem,
heretofore appointed guardian ad litem by an order
of the above entitled court.

II.

That the true names of the defendants John Doe,
Jane Doe, and Doe Company, a corporation, are
unknown to the plaintiff at this time, but when the
same are ascertained, plaintiff will ask leave of
the court to substitute such true names in place
thereof.

III.

That at all times herein mentioned, the Atchison, Topeka and Santa Fe Railway Co., is a corporation, duly organized and existing under the laws of the State of Kansas, and said corporation owns and operates a general railroad transportation business in the County of Los Angeles, more particularly, along a certain track and right of way running in a general easterly and westerly direction across Avalon Boulevard approximately ten feet north of the northerly curb line of Slauson Avenue within the City of Los Angeles, County of Los Angeles, State of California. [2]

IV.

That at all times herein mentioned Avalon Boulevard was and is a public thoroughfare in the City of Los Angeles, County of Los Angeles and State of California, running in a general northerly and southerly direction, intersecting Slauson Avenue, also a public thoroughfare in said City, County and State.

V.

That on June 13th, 1946, at about the hour of 5:55 p. m. on said day, plaintiff Clara Brown alighted from a southbound Los Angeles Transit Lines streetcar, which had stopped immediately north of the said railroad tracks owned and operated by the defendant Atchison, Topeka & Santa Fe Railway Co., and that said plaintiff was walking toward the public sidewalk on the west side of said Avalon Boulevard, at which time and place the

said defendant, through its agents, servants and employees, acting within the scope of their employment, so negligently, carelessly and recklessly operated a certain switch engine No. 2319, west-bound on said railroad tracks, as to cause the same to collide with the plaintiff and drag her a distance of one hundred nine feet (109').

VI.

That by reason of the negligent acts of said defendant in the operation of said train on said railroad tracks at said time and place aforementioned, plaintiff Clara Brown sustained bodily injuries which required the amputation of her right leg, and that plaintiff was also injured about her face, head and body, all of which injuries are permanent in character and progressive in nature. That by reason of said bodily injuries, plaintiff has been damaged in the sum of One Hundred Thousand Dollars (\$100,000.00).

Wherefore, plaintiff prays judgment against the defendants as follows:

1. For general compensatory damages in the sum of One Hundred Thousand Dollars (\$100,000.00). [3]
2. For costs of suit herein incurred.
3. For such other and further relief as the court may deem just in the premises.

CLAUDE A. WATSON and
EDWARD P. HART.

By EDWARD P. HART,
Attorneys for Plaintiff.

State of California,
County of Los Angeles—ss.

Jesse J. Brown, guardian ad litem of Clara Brown being by me first duly sworn, deposes and says: that he is the guardian ad litem of Clara Brown, plaintiff in the above entitled action; that he has read the foregoing complaint for damages and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it is true.

CLARA BROWN,

By JESSE J. BROWN,

Her Guardian ad Litem.

Subscribed and sworn to before me this 29th day of January, 1947.

(Seal) CHARLES D. CUTLER,
Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires June 16, 1950.

[Endorsed]: Filed Jan. 29, 1947. [4]

[Title of Superior Court and Cause.]

PETITION AND ORDER FOR APPOINTMENT
OF GUARDIAN AD LITEM

The petition of Clara Brown respectfully shows to the court:

I.

That your petitioner, Clara Brown, is a minor, who is fifteen years of age, residing with Jesse J. Brown, her father, at Los Angeles, California, and that she has no general or testamentary guardian.

II.

Said minor has a cause of action against defendants, and each of them, upon which her best interests require that she bring an action in this court for damages for personal injuries received as a result of being struck by a train which was owned and operated by the defendants.

III.

That Jesse J. Brown, who is the father of petitioner, is a responsible and competent party to become the guardian ad litem for said minor; that no previous application has been made for the appointment of a guardian ad litem.

Wherefore, your petitioner respectfully prays this Honorable Court for an order appointing Jesse J. Brown, guardian ad litem of Clara Brown, and authorizing and empowering him to bring and prosecute an action as such guardian ad litem, on behalf of [5] said minor, against the owner and operator of said train to recover damages for the said injuries.

/s/ CLARA BROWN,
Petitioner.

CLAUDE A. WATSON and
EDWARD P. HART,
By EDWARD P. HART,
Attorneys for Petitioner.

ORDER APPOINTING GUARDIAN AD
LITEM

Mr. Jesse J. Brown is hereby appointed guardian ad litem of plaintiff, Clara Brown, herein for the purpose of instituting and prosecuting an action in this court in behalf of said minor to recover damages for personal injuries occasioned through negligence upon the cause of action set forth in the said petition for the appointment of a guardian ad litem.

Dated: This 29th day of Jan. 1947.

/s/ H. C. SHEPHERD,

Court Commissioner of Los Angeles County.

(Duly verified.)

[Endorsed]: Filed Jan. 29, 1947. [6]

[Title of Superior Court and Cause.]

NOTICE HEARING ON PETITION
FOR REMOVAL

To the Plaintiff above named and to Claude A. Watson and Edward P. Hart, her attorneys.

You and each of you will please take notice that The Atchison, Topeka and Santa Fe Railway Company, a corporation, one of the defendants in the above entitled action, on the 13th day of February, 1947 in Department 35 of the Superior Court of the State of California in and for the County of Los Angeles, in the City of Los Angeles, at 9:30 o'clock

a. m., or as soon thereafter as the cause may be heard will present to the Superior Court of the State of California, in and for the County of Los Angeles, in the City of Los Angeles, said County and State, its [7] petition for and bond on removal of the above entitled action in the above entitled Court to the District Court of the United States, Southern District of California, Central Division, pursuant to the statutes in such cases made and provided; and that a copy of said petition and a copy of said bond, together with a copy of the proposed order of removal are hereto attached.

Dated this 10th day of February, 1947.

LEO E. SIEVERT,
ROBERT W. WALKER,
By ROBERT W. WALKER.

[Endorsed]: Filed Feb. 10, 1947. [8]

[Title of Superior Court and Cause.]

PETITION FOR REMOVAL

Comes now The Atchison, Topeka and Santa Fe Railway Company, a corporation, and presents this its Petition for Removal of the above entitled cause to the District Court of the United States, for the Southern District of California, Central Division, and in that behalf respectfully shows:

I.

That The Atchison, Topeka and Santa Fe Railway Company, a corporation, is one of the defendants in the above entitled action; that at the time

of the commencement of said action, and for a long time prior thereto, said defendant was and had been a corporation organized and existing [9] under and by virtue of the laws of the State of Kansas, with its principal place of business in the City of Topeka in said State. That it is not now and was not at the time of the commencement of this action and never has been a corporation organized or existing under or by virtue of the laws of the State of California. That it was at all times and now is a citizen or resident of the State of Kansas. That it is not now and was not at any of the times heretofore mentioned a citizen or resident of the State of California, but was at all of said times a citizen and resident of the State of Kansas and a nonresident of the State of California.

II.

That the plaintiff in the above entitled action, was at the commencement of said action, ever since has been and now is a resident of the State of California, and that said plaintiff was not at any of the said times and is not now a resident of the State of Kansas, or of any other states other than the State of California, but at all of said times, plaintiff was and now is a nonresident of the State of Kansas, and of every other state except the State of California.

III.

That the above action is a suit of a civil nature brought by the plaintiff to recover a judgment against your petitioner in the sum of One Hundred

Thousand (\$100,000.00) Dollars, and for costs of suit for damages alleged to have been sustained by plaintiff by reason of the alleged negligent handling of a railroad switch engine, which collided with plaintiff in the City of Los Angeles, California, on June 13, 1946. [10]

IV.

That the amount in controversy in the above entitled action exceeds, exclusive of interest and costs, the sum and value of Three Thousand Dollars (\$3,000.00).

V.

That this is a suit in which there is a controversy between citizens or residents of different states, which can be fully determined as between them, and that your petitioner is actually interested in such controversy.

VI.

That said action is one of which the District Courts of the United States are given original jurisdiction.

VII.

That the time within which your petitioner is required by the laws of this State and the rules of this Court to answer or plead to the Complaint in the above entitled action has not yet expired.

VIII.

That the controversy in said suit is between citizens of different states in that your petitioner at

the time of the commencement of this action was and still is a foreign corporation, created and existing under the laws of the State of Kansas, and was then and still is a resident of a state other than the State of California, and plaintiff was and still is a resident of the State of California.

IX.

That your petitioner offers and presents herewith a good and sufficient bond and surety as provided by the statutes in such cases, conditioned that it will within thirty (30) days from the filing of this petition enter a [11] certified copy of the record in the above entitled cause in the United States District Court for the Southern District of California, Central Division, and will pay all costs that are awarded by the said District Court if it is held that the said action was wrongfully or improperly removed thereto.

Wherefore, petitioner prays that this Court accept this petition and said bond and surety and that said action be removed to said District Court of the United States for the Southern District of California, Central Division, pursuant to the statutes in such cases made and provided, and that this Court proceed no further in this action except to make the order of removal as prayed for, accept and approve the bond presented herewith, and direct the Clerk of this Court to prepare a certified copy of the record in the above entitled action for entry in the said District Court of the United

States for the Southern District of California, Central Division.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, a corporation,

LEO E. SIEVERT,
ROBERT W. WALKER,

By ROBERT W. WALKER,
Its Attorneys.

(Duly verified.)

(Affidavit of Service by Mail attached.)

[Endorsed] Filed Feb. 10, 1947. [12]

[Title of Superior Court and Cause.]

BOND ON REMOVAL

Know all men by these presents: That Indemnity Insurance Company of North America, a corporation, as surety, is held and firmly bound unto Clara Brown, a minor, by Jesse J. Brown, her guardian ad litem, plaintiff in the above entitled action, her legal representatives, successors and assigns, in the sum of One Thousand Dollars (\$1,000.00), lawful money of the United States of America, for the payment of which well and truly to be made it binds itself, its successors and assigns, as the case may be, jointly and severally, firmly by these presents.

The condition of the above obligation is such that:

Whereas, The Atchison, Topeka and Santa Fe Railway Company, a corporation, one of the above named defendants, has applied by petition to the Superior Court of the State [15] of California, in and for the County of Los Angeles, for removal of a certain cause therein pending, wherein CLARA BROWN, a minor, by Jesse J. Brown, her guardian ad litem, is plaintiff and The Atchison, Topeka and Santa Fe Railway Company, a corporation, is one of the defendants, to the District Court of the United States, for the Southern District of California, Central Division, for further proceedings on the grounds in said petition set forth, and that all further proceedings in said action in said Superior Court be stayed.

Now, therefore, if The Atchison, Topeka and Santa Fe Railway Company, a corporation, one of the defendants above named, shall within thirty (30) days from and after the date of the filing of said petition enter in said District Court of the United States of America, a duly certified copy of the record in the above entitled action, and shall pay or cause to be paid all costs that may be awarded therein by the District Court of the United States, if such Court shall hold that such action was wrongfully or improperly removed thereto, then this obligation shall be void, otherwise to remain in full force and effect.

Dated: Los Angeles, California, this 10th day of February, 1947.

INDEMNITY INSURANCE COMPANY OF
NORTH AMERICA

(Seal) By /s/ C. F. BATCHELDER,
Its Attorney in Fact.

The foregoing Bond on Removal is hereby approved as to form and sufficiency of surety, this 10th day of February, 1947.

/s/ H. C. SHEPARD,

Court Commissioner of Los Angeles County.

State of California,
County of Los Angeles—ss,

On this 10th day of February in the year one thousand nine hundred and forty seven before me F. D. Lanctot, a Notary Public in and for the County of Los Angeles, personally appeared C. F. Batchelder known to me to be the person whose name is subscribed to the within instrument at the Attorney-in-Fact of the Indemnity Insurance Company of North America, and acknowledged to me that he subscribed the name of the Indemnity Insurance Company of North America thereto as principal, and his own name, as Attorney-in-Fact.

(Seal) F. D. LANCTOT,
Notary Public in and for the county of Los Angeles, State of California.

My Commission Expires August 24, 1947.

[Endorsed]: Filed Feb. 10, 1947. [16]

In the Superior Court of the State of California
in and for the County of Los Angeles

Honorable Allen W. Ashburn, Judge presiding;
Department No. 35.

Dated February 13, 1947. Entered February 21,
1947.

[Title of Cause.]

COPY OF MINUTE ORDER

Petition and Bond of defendant The Atchison,
Topeka and Santa Fe Railway Company, a corpora-
tion, for removal to District Court of United
States, Southern District of California, Central
Division, comes on for hearing. Leo E. Sievert and
Robert W. Walker by J. H. Cummins appearing
as counsel for the moving defendant. Said matter
is transferred to Department 34 for hearing. [17]

In the Superior Court of the State of California
in and for the County of Los Angeles

Honorable Frank G. Swain, Judge presiding; De-
partment No. 34.

Dated February 13, 1947. Entered February 21,
1947.

[Title of Cause.]

COPY OF MINUTE ORDER

Motion of defendant Atchison, Topeka & Santa
Fe Railway Co. for removal to the District Court
of the United States, Southern District of Califor-

nia, Central Division, transferred from Department 35, comes on for hearing. Joseph H. Cummins appearing as attorney for the defendant. Said motion is granted. [18]

[Title of Superior Court and Cause.]

ORDER OF REMOVAL

The Atchison, Topeka and Santa Fe Railway Company, a corporation, one of the defendants in the above named action, having within the time provided by law filed its petition in due form for the removal of said action to the District Court of the United States, for the Southern District of California, Central Division, and having at the same time offered a good and sufficient bond, as required by law, and said bond having been approved, and it appearing to the Court that said defendant is entitled to have said cause removed to said District Court of the United States for the Southern District of California, Central Division:

Now therefore, it is hereby ordered that said action be removed into the District Court of the United [19] States for the Southern District of California, Central Division, and that all further proceedings in this Court in said action be and they are hereby stayed, and the Clerk of this Court is hereby directed to make a certified copy of the

record in said action for entry in said United States District Court.

Dated this 13th day of February, 1947.

/s/ FRANK G. SWAIN,
Judge.

[Endorsed]: Filed Feb. 13, 1947. [20]

[Title of Superior Court and Cause.]

AFFIDAVIT OF SERVICE OF ORDER
OF REMOVAL

State of California,
County of Los Angeles—ss.

Evelyn Hansen, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within and above entitled action; that affiant's business address is 448 Santa Fe Building, 121 East Sixth Street, Los Angeles 14, California, that on the 14th day of February, 1947, affiant served the within Order of Removal dated February 10th, 1947, on the attorneys for the plaintiff in said action, by placing a true copy thereof in an envelope addressed to the attorneys of record for said defendants at the office address of said attorneys as follows: Messrs. Claude A. Watson and Edward P. Hart, Attorneys at Law, 5937 Monterey Road, Los Angeles 42, California and by then sealing said envelope and depositing the same, with postage

thereon fully prepaid, in the United States Post Office at Los Angeles, California, where is located the office of the attorneys for the person by and for whom said service was made.

That there is delivery service by United States mail at the place so addressed, or there is a regular communication by [21] mail between the place of mailing and the place so addressed.

EVELYN HANSEN.

Subscribed and sworn to before me this 14th day of February, 1947.

(Seal) ETHEL M. MAGNUSON,
Notary Public in and for said County and State.
[Endorsed]: Filed Feb. 14, 1947. [22]

[Title of Superior Court and Cause.]

CLERK'S CERTIFICATE

State of California,
County of Los Angeles—ss.

I, J. F. Moroney, County Clerk and Clerk of the Superior Court in and for the County and State aforesaid, do hereby certify the foregoing copies of documents consisting of the Complaint, Petition and Order for Appointment of Guardian Ad Litem, Notice of Hearing Petition for Removal, Petition for Removal, Bond on Removal, Minute Order of February 13, 1947, transferring hearing on petition for removal to Dept. 34, Minute Order of February 13, 1947, granting petition for removal, Order for

Removal to the United States District Court Southern District of California (Central Division), and Affidavit of Service of Order for Removal, in the action of Clara Brown, a minor, by Jesse J. Brown, her guardian ad litem vs. Atchison, Topeka & Santa Fe Railway Co., a corporation et al to be a full, true and correct copy of all of the original documents on file and/or of record in this office in the above entitled action to date, and that I have carefully compared the same with the original.

In witness whereof, I have hereunto set my hand and affixed the seal of the Superior Court this 28th day of February, 1947.

(Seal) J. F. MORONEY,
County Clerk and Clerk of the Superior Court of
the State of California, in and for the County
of Los Angeles.

By /s/ M. E. SETTLE,
Deputy.

[Endorsed]: Filed March 12, 1947. [23]

In the District Court of the United States Southern
District of California, Central Division

No. 6597-W

CLARA BROWN, a minor, by Jesse J. Brown, her
guardian ad litem,

Plaintiff,

vs.

ATCHISON, TOPEKA & SANTA FE RAIL-
WAY CO., a corporation, T. F. ROBINSON,
John Doe, Jane Doe, and Doe Company, a cor-
poration,

Defendants.

ANSWER

Comes now, The Atchison, Topeka and Santa Fe Railway Company, a corporation, erroneously sued herein as Atchison Topeka & Santa Fe Railway Co., a corporation, and answering for itself alone, and for answer to plaintiff's Complaint, admits, denies and alleges as follows:

I.

Answering Paragraph III of plaintiff's Complaint, this answering defendant alleges that its true name is The Atchison, Topeka and Santa Fe Railway Company, and that it is a corporation organized and existing under and by virtue of the laws of the State of Kansas, and that it is authorized to do and is carrying on the business of a common carrier by rail in the State of California. [25]

II.

Denies each and every, all and singular, the allegations contained in Paragraph V of said Complaint.

III.

Denies each and every, all and singular, the allegations contained in paragraph VI of said Complaint. Further answering said Paragraph VI, defendant denies that Clara Brown was damaged in the sum of One Hundred Thousand Dollars (\$100,000.00), or in any sum, or at all.

As a further, separate and affirmative defense to plaintiff's complaint, answering defendant alleges:

I.

That at the time and place set forth in the Complaint on file herein, Clara Brown failed to exercise ordinary care for her own safety under conditions then existing, which lack of care on her part proximately caused or contributed to any injuries sustained by her. That any injury or damage sustained by Clara Brown, was proximately caused or contributed to by her own negligence.

As a second, separate and affirmative defense to Plaintiff's complaint, answering defendant alleges:

I.

That the sole proximate cause of any injury suffered by plaintiff, Clara Brown, as alleged in said Complaint was the negligence of said Clara Brown at said time and place in failing to exercise ordi-

nary care under the circumstances then existing for her own safety. [26]

Wherefore, this answering defendant prays that plaintiff take nothing by her Complaint on file herein and that this answering defendant be awarded its costs of suit herein and that the Court grant such other and further relief as to the Court may seem meet and proper.

LEO E. SIEVERT,
ROBERT W. WALKER,

By /s/ ROBERT W. WALKER,
Attorneys for Defendant, The Atchison, Topeka
and Santa Fe Railway Company, a corporation.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed March 17, 1947. [27]

[Title of District Court and Cause.]

AMENDED COMPLAINT FOR DAMAGES

(Personal Injuries)

Plaintiff complains of defendants, and for cause of action alleges as follows:

I.

That the above named Clara Brown is a minor of the age of 15 years, and brings this action by and through Jesse J. Brown, her guardian ad litem, heretofore appointed guardian ad litem by an order of the above entitled court.

II.

That the true names of the defendants John Doe, Jane Doe, and Doe Company, a corporation, are unknown to the plaintiff at this time, but when the same are ascertained, plaintiff will ask leave of the court to substitute such true names in place thereof.

III.

That at all times herein mentioned, the Atchison, Topeka [28] and Santa Fe Railway Company, is a corporation, duly organized and existing under the laws of the State of Kansas, and said corporation owns and operates a general railroad transportation business in the County of Los Angeles, more particularly, along a certain track and right of way running in a general easterly and westerly direction across Avalon Boulevard approximately ten feet north of the northerly curb line of Slauson Avenue within the City of Los Angeles, County of Los Angeles, State of California;

IV.

That at all times here mentioned Avalon Boulevard was and is a public thoroughfare in the City of Los Angeles, County of Los Angeles and State of California, running in a general northerly and southerly direction, intersecting Slauson Avenue, also a public thoroughfare in said City, County and State.

V.

That at all times herein mentioned there was in full force and effect in the City of Los Angeles, County of Los Angeles, State of California a muni-

cipal ordinance, the same being L. A. Municipal Code Ordinance No. 77000, as amended by ordinance as Section 72.10 thereof.

“(a) The operator of any steam, diesel or gasoline propelled railroad train, car or other rolling equipment shall not drive, or cause or permit to be driven such train, car or equipment into or upon a highway at a speed greater than is reasonable or prudent having due regard for the traffic on, and the surface and width of the highway, and in no event at a speed which endangers the safety of persons or property; provided however, that whenever such train, car or equipment is operated longitudinally over the same portion of a highway that is also used by motor vehicles, the maximum lawful speed for such operation shall be ten (10) miles per hour. [29]

“(b) The speed of any such train, car or equipment not in excess of the limits herein specified is lawful unless clearly proved to be in violation of the basic rule hereinabove in this section declared.

“(c) The speed of any such train, car or equipment upon a highway in excess of any of the limits specified in this section is prima facie unlawful unless the defendant establishes by competent evidence that any speed in excess of said limits did not constitute a violation of the basic rule hereinabove in this section declared, at the time, place and under the conditions then existing.

“(d) The prima facie limits referred to above are as follows:

“1. Fifteen (15) miles per hour:

“(a) When entering any highway crossing within the district included within the following described boundaries: Beginning at the intersection of Soto Street and Huntington Drive, southerly along Soto Street to the southerly city limits; thence southerly and westerly along the city boundary to Florence Avenue, thence westerly along Florence Avenue to the west city boundary, thence northerly along the west city boundary and west Boulevard to Slauson Avenue, thence easterly on Slauson Avenue to Western Avenue, thence northerly from Western Avenue to Vernon Avenue, thence easterly along Vernon Avenue to Broadway, thence northerly along Broadway and North Broadway to Mission Road, thence northerly along Mission Road and Huntington Drive to the point of beginning.”

That said ordinance was duly adopted, approved and enacted by the City Counsel of the City of Los Angeles and signed by the mayor thereof and published in the manner and in accordance with law.

VI.

That at all times herein mentioned the defendant's switch [30] engine No. 2319, traveling at a speed in excess of Fifteen (15) miles per hour in violation of said city ordinance. The excessive speed of said engine contributed directly and proximately to the cause of said collision and/or damage hereinafter described.

VII.

That on June 13th, 1946, at about the hour of 5:55 p. m. on said day, plaintiff Clara Brown alighted from a southbound Los Angeles Transit

Line streetcar, which had stopped immediately north of the said railroad tracks owned and operated by the defendant Atchison, Topeka & Santa Fe Railway Co., and that said plaintiff was walking toward the public sidewalk on the west side of said Avalon Boulevard, at which time and place the said defendant, through its agents, servants and employees, acting within the scope of their employment, so negligently, carelessly and recklessly operated a certain switch engine No. 2319, westbound on said railroad tracks, as to cause the same to collide with the plaintiff and drag her a distance of one hundred nine feet (109').

VIII.

That by reason of the negligent acts of said defendant in the operation of said train on said railroad tracks at said time and place aforementioned, plaintiff Clara Brown sustained bodily injuries, which required the amputation of her right leg, and that plaintiff was also injured about her face, head and body, all of which injuries are permanent in character and progressive in nature. That by reason of said bodily injuries, plaintiff has been damaged in the sum of One Hundred Thousand Dollars (\$100,000.00).

Wherefore, plaintiff prays judgment against the defendants as follows:

1. For general compensatory damages in the sum of One Hundred Thousand Dollars (\$100,000.00).
2. For costs of suit herein incurred. [31]

3. For such other and further relief as the court may deem just in the premises.

CLAUDE A. WATSON and
EDWARD P. HART,
By /s/ EDWARD P. HART,
Attorneys for Plaintiff.

[Endorsed]: Filed Nov. 21, 1947. [32]

[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT

Comes Now, defendant The Atchison, Topeka and Santa Fe Railway Company, a corporation, erroneously sued herein as Atchison, Topeka & Santa Fe Railway Co., a corporation, and answering for itself alone, and for answer to plaintiff's Amended Complaint, Admits, Denies and Alleges as follows:

I.

Answering Paragraph III of plaintiff's Amended Complaint, this answering defendant Alleges that its true name is The Atchison, Topeka and Santa Fe Railway Company, and that it is a corporation organized and existing under and by virtue of the laws of the State of Kansas, and that it is authorized to do and is carrying on the business of a common carrier by rail in the State of California. [33]

II.

Answering Paragraph V, this answering defendant Alleges that it has no information or belief sufficient to enable it to answer the allegations contained in said paragraph and basing its answer on

said grounds, Denies generally and specifically each and every allegation therein contained.

III.

Denies each and every, all and singular, the allegations contained in Paragraphs VI and VII of said Amended Complaint.

IV.

Denies each and every, all and singular, the allegations contained in Paragraph VIII of said Amended Complaint. Further answering said Paragraph VIII, defendant denies that Clara Brown was damaged in the sum of One Hundred Thousand Dollars (\$100,000.00), or in any sum, or at all.

As a First, Separate and Affirmative Defense to Said Complaint, This Answering Defendant Alleges as Follows:

I.

That at the time and place set forth in the Complaint on file herein, said injuries, if any, sustained by Clara Brown were the result of an inevitable and unavoidable accident.

As a Second, Separate and Affirmative Defense to Said Amended Complaint, This Answering Defendant Alleges as follows:

I.

That at the time and place set forth in the Amended Complaint on file herein, Clara Brown failed to exercise ordinary care for her own safety under conditions then existing, which lack of care on her part proximately caused or contributed to

any injuries sustained by her. That any injury or damage [34] sustained by Clara Brown, was proximately caused or contributed to by her own negligence.

As a Third, Separate and Affirmative Defense to Plaintiff's Amended Complaint, This Answering Defendant Alleges as Follows:

I.

That the sole proximate cause of any injury suffered by plaintiff, Clara Brown, as alleged in said Amended Complaint was the negligence of said Clara Brown at said time and place in failing to exercise ordinary care under the circumstances then existing for her own safety.

Wherefore, this answering defendant prays that plaintiff take nothing by her Amended Complaint on file herein and that this answering defendant be awarded its costs of suit herein and that the Court grant such other and further relief as to the Court may seem meet and proper.

LEO E. SIEVERT,
ROBERT W. WALKER,

By /s/ ROBERT W. WALKER,

Attorneys for Defendant, The Atchison, Topeka
and Santa Fe Railway Company, a corporation.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed Dec. 5, 1947. [35]

[Title of District Court and Cause.]

ORDER REMANDING CAUSE TO STATE
COURT

On this 14th day of December, 1948, this cause came on regularly before the court for trial; Claude A. Watson, Edward P. Hart, and Samuel P. Young, Esqs., by Samuel P. Young, Esq., appearing as counsel for the plaintiff; and Robert W. Walker, J. H. Cummins and J. B. Kramer, Esqs., by J. H. Cummins, Esq., appearing as counsel for the defendant The Atchison, Topeka and Santa Fe Railway Company; and the court on its own motion having ordered this cause remanded to the State Court for the reason that this cause has been improperly removed to this court, and on the ground that this court does not have jurisdiction herein.

It Is, Therefore, Ordered that this cause be, and it is, remanded to the Superior Court of the State of California, in and for the County of Los Angeles.

Dated: Los Angeles, California, December 14, 1948.

/s/ BEN HARRISON,
U. S. District Judge.

Judgment entered Dec. 14, 1948. Docketed Dec. 14, 1948. Book 54, Page 476. Edmund L. Smith, Clerk. By C. A. Simmons, Deputy.

[Endorsed]: Filed Dec. 14, 1948. [37]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Clerk of the Above-Entitled Court:

Notice Is Hereby given that the defendant, The Atchison, Topeka and Santa Fe Railway Company, one of the defendants above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the Order Remanding Cause to the Superior Court of the State of California, and entered in this action on the 14th day of December, 1948.

Dated this 27th day of December, 1948.

ROBERT W. WALKER,
J. H. CUMMINS,
J. B. KRAMER,

By /s/ J. H. CUMMINS,

Attorneys for the Defendant, The Atchison, Topeka and Santa Fe Railway Company.

[Endorsed]: Filed Dec. 27, 1948. [38]

[Title of District Court and Cause.]

NOTICE OF ATTORNEYS TO BE SERVED

To the Clerk of the Above Court:

You will please take notice that the attorneys to be served are as follows: Messrs. Claude A. Watson, and Edward P. Hart, 5937 Monterey Road, Los Angeles 42, Calif. Mr. Samuel P. Young, At-

torney at Law, 715 Black Building, 357 S. Hill Street, Los Angeles, Calif.

Dated this 27th day of December, 1948.

ROBERT W. WALKER,
J. H. CUMMINS,
J. B. KRAMER,

By /s/ J. H. CUMMINS,

Attorneys for the Defendant, The Atchison, Topeka and Santa Fe Railway Company.

[Endorsed]: Filed Dec. 27, 1948. [39]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

The following are the points upon which appellant relies for its appeal from the Order of Remand, entered on the 14th day of December, 1948.

(1) An Order of Remand by a Federal Court is an appealable order.

(2) Whether a cause of action is alleged by the pleadings in a civil action pending before a State Court is a matter to be determined in accordance with State law.

(3) The State Court has the power to determine whether a cause of action has been stated against a resident or citizen of the State when a petition for removal is filed in said Court for the removal of a civil action to the Federal District Court.

(4) A State Court having determined that a cause of action is not stated against a resident defendant and thereafter [40] ordering the case removed to the Federal Court, the question of whether a cause of action is stated in the pleading is fully determined and is not subject to collateral attack by a motion to remand in the Federal District Court.

(5) The action by the Federal District Court in remanding the case to the State Court for the reason that a cause of action was believed by said Federal District Court to have been stated against the resident defendant is wholly invalid and without effect where the State Court in the same case and prior to removal had determined that a cause of action was not stated.

(6) The Federal District Court was in error in remanding the case to the State Court for lack of jurisdiction.

Dated this 12th day of January, 1949.

ROBERT W. WALKER,
J. H. CUMMINS,
J. B. KRAMER,

By /s/ J. B. KRAMER,
Attorneys for the Defendant, The Atchison, To-
peka and Santa Fe Railway Company.

[Endorsed]: Filed Jan. 13, 1949. [41]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

To the Clerk of the Above-Entitled Court:

You are hereby requested to make a transcript of the record to be filed in the United States Court of Appeal for the Ninth Circuit, pursuant to appeal taken. You will include in said transcript, the following:

(1) All pleadings, processes, orders and documents filed in the above-entitled Court, comprising the record on removal from the Superior Court of the State of California, in and for the County of Los Angeles.

(2) All pleadings, processes and orders filed in the above-entitled case or made a part of the record thereof.

(3) A transcript of proceedings before Hon. Ben Harrison, on the 14th day of December, 1948.

(4) The Order of Remand made by the Hon. Ben Harrison. [42]

(5) Notice of Appeal with date of filing.

(6) Statement of Appellant of Points on which it intends to rely.

(7) The designations of the parties as to the matter to be included in the record.

The transcript of record herein requested is to be prepared as required by law and the rules of

the Civil Procedure of the Federal Court, with particular reference to Rules 73-G and 75-K of the said Federal Rules.

Dated this 12th day of January, 1949.

ROBERT W. WALKER,
J. H. CUMMINS,
J. B. KRAMER,

By /s/ J. B. KRAMER,
Attorneys for the Defendant, The Atchison, Topeka and Santa Fe Railway Company.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed Jan. 13, 1949. [43]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 44, inclusive, contain the original papers on removal as certified by the clerk of the Superior Court for the State of California, County of Los Angeles; Answer; Amended Complaint for Damages; Answer to Amended Complaint; Order Remanding Cause to State Court; Notice of Appeal; Notice of Attorneys to be Served; Statement of Points on Appeal and Designation of Contents of Record on Appeal which, together with reporter's transcript of proceedings on December 14, 1948, transmitted herewith, constitute

the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$1.60 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 28th day of January, A.D. 1949.

[Seal]

EDMUND L. SMITH,
Clerk.

[Title of District Court and Cause.]

Hon. Ben Harrison, Judge presiding.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Los Angeles, California

Tuesday, December 14, 1948

Appearances: For the Plaintiff: Claude A. Watson, Esquire, Edward P. Hart, Esquire, and Samuel P. Young, Esquire. For the Defendant Atchison, Topeka & Santa Fe: Robert W. Walker, Esquire, J. H. Cummins, Esquire, and J. B. Kramer, Esquire.

The Court: Case on trial.

The Clerk: Clara Brown, a minor, versus the Atchison, Topeka and Santa Fe Railway Company, No. 6597-BH.

Mr. Cummins: Ready for the respondent.

Mr. Young: Ready for the plaintiff.

The Court: Gentlemen, I have decided that the court has no jurisdiction in this case.

Not only has the Santa Fe been subpoenaed but

an individual who, from other papers, is shown to be an engineer employed by the Santa Fe Railway.

I feel that this case has been improperly removed to this court. I am sorry that was not discovered earlier. Because of that this case will have to be tried in the Superior Court instead of the Federal Court. This court has no jurisdiction.

Any judgment that might be rendered in this court would be void and would be set aside and there wouldn't be any protection for any of the parties concerned.

The court should have discovered this situation before the jury was summoned. Counsel, somewhere along the line, should have discovered it also. I suppose responsibility for this will have to be divided between counsel.

The jury will be excused until notified to return and the case will be ordered remanded to the Superior Court for trial.

Mr. Cummins: If your Honor please, will you state what the grounds of the remand is?

The Court: It is on the ground the case should never have been removed. At the time it was removed there was a citizen of California subpoenaed as a defendant. It does not appear affirmatively from the papers that the other defendant was not a citizen of California.

That is a burden placed upon the moving party to show. You based your right to have it tried in this court upon the fact that the railroad company is a citizen of Kansas. The affidavit does not show the engineer's residence and no point

was made of it. You used more or less the regular form of petition for removal just the same as though you were the sole defendant named. There is named an individual in addition to the John Does and I am satisfied that any steps that I have taken or that this court has taken since it has been here were entirely void.

I am sorry for the delay but it doesn't interfere with a proper adjudication of the rights of the parties.

Mr. Cummins: I am at a loss to know what the law is with respect to the appealability of such an order, or the necessity of stating an exception to the order. In any event I would like to except to the order of the court.

The Court: I am glad to allow you an exception. I don't know what the new rule provides but under the old rule there is no review.

Mr. Young: I had the idea that since the change there was a review permitted.

The Court: There may be but when there is a question of jurisdiction in doubt it shall be resolved against jurisdiction. Of course if it is in the state court and nobody else is served you can bring it back.

Mr. Young: Your Honor, am I correct in interpreting your Honor's decision as not having any effect upon——

The Court: It doesn't have anything to do with the merits of the case at all.

Mr. Young: And that we will be entitled to go to trial.

The Court: The only thing it does is to unfortunately create a delay.

The Clerk: I suggest one side or the other prepare an order.

Mr. Cummins: I will do that, your Honor.

The Court: Very well.

(Whereupon the above-entitled proceedings were concluded.)

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 14th day of January, A.D. 1949.

/s/ J. D. AMBROSE,
Official Reporter.

[Endorsed]: Filed Jan. 19, 1949.

[Endorsed]: No. 12169. United States Court of Appeals for the Ninth Circuit. The Atchison, Topeka and Santa Fe Railway Company, Appellant, vs. Clara Brown, a Minor, by Jesse J. Brown, Her Guardian, ad litem, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed January 31, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12169

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, a Corporation,

Appellant,

vs.

CLARA BROWN, etc.,

Appellee.

DESIGNATION OF POINTS ON APPEAL

To the Clerk of the United States Court of Appeals for the Ninth Circuit:

Comes now Appellant, under the provisions of Subdivision 6, Rule 19, and adopts as its points on appeal the Statement of Points appearing in the transcript of record certified to this Court.

Dated this 8th day of February, 1949.

ROBERT W. WALKER,
J. H. CUMMINS,
J. B. KRAMER,

By /s/ J. B. KRAMER,
Attorneys for Appellant.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed February 11, 1949. Paul P. O'Brien, Clerk.

TOPICAL INDEX

	PAGE
Basis of jurisdiction.....	1
Questions presented	2
Specifications of error.....	2

I.

An order of remand by a federal court is an appealable order....	3
--	---

II.

The Federal District Court was in error when it assumed authority to determine whether a cause of action had been stated in the complaint against a resident citizen of California, the state court from which the case had been removed having previously determined that a cause of action was not stated	9
Conclusion	12

TABLE OF AUTHORITIES CITED

CASES	PAGE
Armour & Co. v. Kloebe, 109 F. 2d 72.....	10
Ayers v. Chicago, 101 U. S. 184, 25 L. Ed. 838.....	4
Chicago and Alton R. R. Co. v. Wiswall (23 Wall. 507), 90 U. S. 507, 23 L. Ed. 103.....	6
Clancy v. Brown, 71 F. 2d 110.....	9
Employers Re-Insurance Corp. v. Bryant, 299 U. S. 374, 81 L. Ed. 289.....	5, 10
Good v. Hartford Accident & Indemnity Co., 39 Fed. Supp. 475	5, 10
Hoadley v. City and County of San Francisco, 94 U. S. 4, 24 L. Ed. 34.....	4
Kloebe v. Armour & Co., 311 U. S. 199, 85 L. Ed. 124.....	11
Little York Gold-Washing etc. Co. v. Keyes, 96 U. S. 199, 24 L. Ed. 656.....	5
Madisonville Traction Co. v. St. Bernard Min. Co., 196 U. S. 239, 49 L. Ed. 462.....	9
McAllister v. Chesapeake & O. R. Co., 243 U. S. 302, 61 L. Ed. 735	4
Nashville v. Cooper, 73 U. S. 247, 18 L. Ed. 851.....	5, 6
Pennsylvania Co., Re, 137 U. S. 451, 34 L. Ed. 738.....	5
Rogers v. Watson, et al., 46 F. 2d 753.....	5, 8
Satterley, In re, 102 F. 2d 144.....	8
Southern Pac. Co. v. Haight, 126 F. 2d 900.....	9
Steinfur Patents Corporation v. Meyerson et al., 49 F. 2d 765....	8
Stone v. State of South Carolina, 17 U. S. 430, 29 L. Ed. 962....	9
Vietti, et al. v. Wayne, et al., 136 F. 2d 771.....	8
Wecker v. National Enameling & S. Co., 204 U. S. 176, 51 L. Ed. 430	4, 7

PAGE

Wilson v. Republic Iron & S. Co., 257 U. S. 92, 66 L. Ed. 144	4, 7, 9, 10
Zadig v. Aetna Ins. Co., 42 F. 2d 142.....	7, 8

STATUTES

Judiciary Act of 1789 (Act of Sept. 24, 1789, Chap. 20, 1 Stat. 73)	3
Judiciary Act of 1875, Chap. 137, 18 Stat. 470, 472.....	4
Judiciary Act of March 3, 1887, Chap. 373, 24 Stat. 552.....	4
Public Law 773, Chap. 646, 80th Cong., 2d Sess.....	5
United States Code, Title 28, Sec. 1291	1, 2
United States Code, Title 28, Secs. 1441-1450.....	1, 3, 5
United States Code Annotated, Title 28, Sec. 71.....	11
United States Code Annotated, Title 28, Sec. 71, Note 21.....	5
United States Code Annotated, Title 28, Sec. 72.....	11
United States Code Annotated, Title 28, Sec. 72, Notes 325, 326..	10
United States Code Annotated, Title 28, Sec. 80.....	11

No. 12169

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

Appellant,

vs.

CLARA BROWN, a Minor, by Jesse J. Brown, Her Guardian
ad Litem,

Appellee.

APPELLANT'S OPENING BRIEF.

Basis of Jurisdiction.

Respondent, a citizen of the State of California, filed a complaint in the Superior Court of the State of California, in and for the County of Los Angeles. This complaint stated a cause against the appellant herein, a citizen and resident of the State of Kansas. A petition for removal on the grounds of diversity of citizenship was filed in the State Court, and the State Court granted the removal, there being no cause of action stated against a resident defendant. On the date set for trial, the Federal District Court, on its own motion, remanded the case to the Superior Court, on the grounds that the Federal Court was without jurisdiction. No evidence was taken in the Federal Court.

The attention of the Court is invited to 28 U. S. C., Sections 1291, and 1441 to 1450, inclusive.

Questions Presented.

A. Is the order of the Federal District Court remanding a case to a State Court a final decision within the meaning of 28 U. S. C. 1291, which section provides for appeals from final decisions?

B. Does the Federal District Court have the power to determine that a cause of action is stated under state law in a case where the State Court, in the removal proceedings, has prior thereto determined a cause of action was not stated?

Specifications of Error.

The Federal District Court was in error when it assumed the authority to determine whether a cause of action had been stated in the complaint against a resident citizen of California, the State Court from which the case had been removed having previously determined that a cause of action was not stated.

(1) Whether a cause of action based upon the state statute is stated in the complaint is a matter of state law.

(2) The State Court has the power to determine whether a cause of action has been stated against a resident citizen upon being presented with a petition for removal, the State Court having determined that a cause of action is not stated against a resident defendant may thereupon order the case removed to the Federal Court.

(3) The question of whether a cause of action has been stated by the complaint was fully determined and is not subject to collateral attack by motion of remand.

(4) The action of the Federal District Court in remanding the case to the State Court for the reason that a cause of action was believed by the Federal District Court

to have been stated against a resident defendant is wholly invalid and without effect, where the State Court in the same case and prior to removal had determined that a cause of action was not stated.

I.

An Order of Remand by a Federal Court Is an Appealable Order.

The proposition that an order of remand is an appealable order has reference to an order of the Federal District Court remanding a case to a State Court and does not contemplate or include an order of remand by an appellate court to an inferior court or a trial court within its own judicial system.

It is the contention of the appellant that Public Law 773, 80th Congress, 28 U. S. C. A. 1441 to 1450, terminates the previous exclusive authority of the Federal District Judge to determine the removability of an action in a proceeding to remand. It is believed that a brief historical review of the statutes on removal may at this time prove helpful.

The Judiciary Act of 1789 (Act of September 24, 1789, Chap. 20, 1 Stat. 73) provided for the removal of certain classes of cases from the State Court to the Federal Circuit Court. The statute further provided as follows:

“* * * it shall then be the duty of the State Court to accept the surety and proceed no further in the case. * * *”

This statute contained no provision for a remand to the State Court.

From the first Judiciary Act of 1789, until 1875, no material change in the removal statutes were enacted

excepting to enlarge the class of cases removable. The Judiciary Act of 1875, Chapter 137, 18 Stat. 470, 472, was a departure from the former Judiciary Act in two respects. It provided for a remand by the Federal Court to the State Court and provided for an appeal or writ of error to the Supreme Court from the order of the Federal Court dismissing or remanding the case. The provisions as to the duty of the State Court to proceed no further upon removal were retained.

Hoadley v. City and County of San Francisco, 94
U. S. 4, 24 L. Ed. 34;

Ayers v. Chicago, 101 U. S. 184, 25 L. Ed. 838.

A third major change was enacted in 1887, being the Judiciary Act of March 3, 1887, Chapter 373, 24 Stat. 552. This statute expressly prohibited appeal or writ of error from order of the Federal Court remanding the case to the State Court. It will be noted here that there was no prohibition for an appeal or writ of error for refusing to remand a case and such appeal or writs of error have been effected.

Wecker v. National Enameling & S. Co., 204 U. S.
176, 51 L. Ed. 430, 434;

Wilson v. Republic Iron & S. Co., 257 U. S. 92,
66 L. Ed. 144, 148;

McAllister v. Chesapeake & O. R. Co., 243 U. S.
302, 61 L. Ed. 735, 738.

In addition to the express prohibition against appeal or writ of error, a new provision was enacted as follows:

“such remand shall be immediately carried into execution.”

This statute was held to be a complete prohibition against appellate review including action through mandamus.

Re Pennsylvania Co., 137 U. S. 451, 34 L. Ed. 738;

Employers Re-Insurance Corp. v. Bryant, 299 U. S. 374, 81 L. Ed. 289.

The fourth and final major change was enacted by Public Law 773, 80th Congress, Chapter 646, Second Session, codified in 28 U. S. C. A., Sections 1441 to 1450, becoming effective September 1, 1948. This statute provides for a remand by the District Court and eliminates the prior prohibition against appeal or writ of error on an order of remand. It also eliminates the provisions that the order of remand shall be immediately carried into execution. The provision requiring the State Court to proceed no further has also been changed, now reading, 'and the State Court shall proceed no further therein unless the cause is remanded.'

The jurisdiction of the Federal District Court of a case removed thereto is purely statutory and entirely dependent hereon.

Rogers v. Watson, et al., 46 F. 2d 753;

Nashville v. Cooper, 73 U. S. 247, 18 L. Ed. 851;

Little York Gold-Washing etc. Co. v. Keyes, 96 U. S. 199, 24 L. Ed. 656, and other cases cited Note 21 to 28 U. S. C. A. 71;

Good v. Hartford Accident & Indemnity Co., 39 Fed. Supp. 475, 481.

In order for the Federal Court to acquire jurisdiction, the proceedings on their face must in fact or in law come within the provisions of the removal statute, and in addition thereto the procedure followed must be in accordance

with that prescribed by the statute. The power of a Federal District Court to remand a case to the State Court is likewise purely statutory. In the absence of a statute granting authority, the Federal Court may not by an order of remand empower or require a State Court to act. The State Court being outside Federal judicial system the order of remand could not be considered as one inherent with the Court. This is clearly evident in a removal case since the only authority the Federal Court could exercise was that authorized by the removal statute.

Nashville v. Cooper, 73 U. S. 247, 6 Wall. 851.

Any further act or order of the Court would be without jurisdiction. Were the Federal Court to remand the cause without the authority of statute, such order of remand would be no more than an announcement that the Federal Court refused to take jurisdiction of the case and the State Court from whence the case was originally removed would no longer be obligated to withhold further proceedings.

The case of *Chicago and Alton R. R. Co. v. Wiswall* (23 Wall. 507), 90 U. S. 507, 23 L. Ed. 103, is often cited as authority for holding that an order of remand is not a final order and not appealable. This decision was rendered at a time when there was no statutory authority to remand. Subsequent cases on the point decided when there was an express prohibition against appeal or writ of error within the statute which created the right of removal and therefore the question of finality of the order of remand was never in issue subsequent to 1875.

Whether an order is final and thereby appealable is largely dependent upon the position of the parties litigant after the order is made. The fact that another course of

procedure may be available to a party does not prevent the order from being a final one.

Wecker v. National Enameling & S. Co., 204 U. S. 176, 51 L. Ed. 430, 434.

The case of *Wilson v. Republic Iron & S. Co.*, 257 U. S. 92, 66 L. Ed. 144, was a case involving a dismissal of a cause removed to the Federal Court after the Federal Court refused to remand to the State Court. The case was dismissed for lack of prosecution. The question presented on appeal was whether the order of the Court dismissing the case was final and thereby appealable. The Court stated (p. 148):

“Of course, the review can be had only after a final judgment. *McLish v. Roff*, 141 U. S. 661, 35 L. ed. 893, 12 Sup. Ct. Rep. 118. But a judgment of dismissal, such as is shown here, is a final judgment. That it leaves the merits undetermined and may not be a bar to another action does not make it interlocutory. It effectually terminates the particular case, prevents the plaintiff from further prosecuting the same, and relieves the defendant from putting in a defense. This gives it the requisite finality for the purposes of a review.” (Citing cases.)

The problem as to whether an order is final has been considered at some length by the Second Circuit Court of Appeals, beginning with the case of *Zadig v. Aetna Ins. Co.*, 42 F. 2d 142. This decision concerned a case which had been dismissed for lack of prosecution and the Judge, believing the Court to be without further jurisdiction to vacate the order, refused to vacate the order of dismissal. The Court states at page 143:

“We think that the order, despite its name, was a final judgment, not an ‘order for judgment’ * * *.

It assumed finally to dispose of the cause *ex proprio vigore*, contemplated no further action, and was like those considered in *Hamilton Coal Co. v. Watts*, 232 F. 832 (C. C. A. 2), and *Colorado Eastern Ry. Co. v. Union Pac. R. Co.*, 94 F. 312 (C. C. A. 8). To be sure, in each of these there was a judgment, *eo nomine*, for costs, but it makes no difference what the court's determination be called, so that it actually disposes of the suit and leaves nothing further to be done. Nor does lack of entry affect the validity of the judgment for most purposes."

The case of *Steinfur Patents Corporation v. Meyerson, et al.*, 49 F. 2d 765, at page 766, decided by the same Circuit, commented upon the *Zadig* case as follows:

"The authority relied on by the defendants, *Zadig v. Actna Ins. Co.*, 42 F. (2d) 142 (C. C. A. 2), involved a dismissal for lack of prosecution. The court considered the order of dismissal as if a final decree. We held that the trial court's refusing to consider the motion on the merits was not an exercise of discretion, but rather passing upon the want of jurisdiction. We held the order final and appealable. Such orders are appealable." (Cases cited.)

This case was cited and followed by *Vietti, et al., v. Wayne, et al.*, 136 F. 2d 771.

A judgment of dismissal for lack of jurisdiction dependent upon diversity of citizenship was considered to be final and appealable in the case of *Rogers v. Watson*, 46 F. 2d 753, at page 754.

An order of remand has been held to be a decision on the merits.

In re Satterley, 102 F. 2d 144 (1st case).

II.

The Federal District Court Was in Error When It Assumed the Authority to Determine Whether a Cause of Action Had Been Stated in the Complaint Against a Resident Citizen of California, the State Court From Which the Case Had Been Removed Having Previously Determined That a Cause of Action Was Not Stated.

(1) Whether a cause of action based upon the state statute is stated in the complaint is a matter of state law.

(2) The State Court has the power to determine whether a cause of action has been stated against a resident citizen upon being presented with a petition for removal, the State Court having determined that a cause of action is not stated against a resident defendant may thereupon order the case removed to the Federal Court.

Upon the filing of a petition in the State Court for the removal of a cause to the Federal Court, the State Court is obligated to determine whether as a matter of law a removable cause has been pleaded.

Stone v. State of So. Carolina, 117 U. S. 430, 29 L. Ed. 962;

Clancy v. Brown, 71 F. 2d 110;

So. Pac. Co. v. Haight, 126 F. 2d 900;

Madisonville Traction Co. v. St. Bernard Min. Co., 196 U. S. 239, 49 L. Ed. 462, 464, 465;

Wilson v. Republic Iron & S. Co., 257 U. S. 92, 66 L. Ed. 144.

If the State Court finds that the cause is removable, it is obligated to order same removed although its failure to enter an order will not deprive a Federal Court of juris-

diction in the case. If the State Court finds that the petition and pleadings in the case do not present a removable case, it is not obligated to grant the removal and is authorized to proceed to try the case. A judgment entered as a result of such trial is valid, should the Federal Court determine the case to be non-removable.

Wilson v. Republic Iron & S. Co., 257 U. S. 92, 66 L. Ed. 144;

Employers Reinsurance Corp. v. Bryant, 299 U. S. 374, 81 L. Ed. 289.

The decision of the State Court as to whether or not a cause of action is stated under a claim filed under a state statute is to be determined by the State Court and the Federal Court is without authority to determine that a cause of action is stated contrary to the ruling of the State Court on the matter.

Good v. Hartford Accident & Indemnity Co., *supra*.

See also cases cited, Notes 325 and 326, to 28 U. S. C. A., Section 72.

(3) The question of whether a cause of action has been stated by the complaint was fully determined and is not subject to collateral attack by motion of remand.

(4) The action of the Federal District Court in remanding the case to the State Court for the reason that a cause of action was believed by the Federal District Court to have been stated against a resident defendant is wholly invalid and without effect, where the State Court in the same case and prior to removal had determined that a cause of action was not stated.

The issues in this appeal have been discussed in considerable detail by the case of *Armour & Co. v. Kloebe*, 109

F. 2d 72, which case was overruled by the Supreme Court in the case of *Kloebe v. Armour & Co.*, 311 U. S. 199, 85 L. Ed. 124. The decision of the Circuit Court was under the former Judiciary Act contained in 28 U. S. C. A., Sections 71, 72 and 80, which contained express prohibition against appeal or writ of error, yet the Circuit Court was of the opinion that the question of separability of causes of action had been fully determined by the State Court of Ohio, from which Court the action had been removed, and therefore held that the Federal District Court was without authority to render a decision on the matter. The Supreme Court in overruling the Circuit Court points out that the District Court considered the petitions and affidavits. This fact clearly distinguishes the *Armour* case from the case at bar for the reason that in the case now before this Court, whether or not a cause of action was stated by the complaint was purely a matter of state law, which was determined by the State Court when it ordered the cause removed and that no evidence was necessary to be heard in the Federal District Court to determine the issue, and as a matter of fact no evidence was considered. We thus find that the reversal of the Circuit Court in the *Armour* case was on a point not present in the case now before this Honorable Court.

Had the respondent been dissatisfied with the decision of the State Court, the procedure to follow was to appeal. This the respondent did not do and in fact did not question the decision at any time since the order of remand from which this appeal is taken was issued upon the Federal District Court's own motion.

To permit a remand under the present state of the record would be allowing the Federal District Court to overrule the State Court as to what is necessary under state law to set out a cause of action in a complaint.

A reading of the complaint fails to show that any individual named as a resident, caused or contributed in any manner to the accident upon which the cause of action is based. [Tr. of Record pp. 2 to 5.]

Conclusion.

Whether an order of remand is such a final order as to permit the Court of Appeals to take jurisdiction is to be determined by the position in which the parties to the litigation find themselves as a result of the order. The name applied to the order in itself is of little importance. Decisions holding an order of remand not to be a final order are merely *dictum*, in those cases where there was no statutory authorization for remand, and in those cases decided subsequent to 1875, since there was an express statutory provision or prohibition with reference to appeal or writ of error.

The State Court has the power and duty to determine whether a complaint states a cause of action under a state statute and its decision on this matter of law is final and conclusive. The Federal Court is empowered to consider evidence and determine questions of fact and matters of Federal law but may not by an order of remand reverse the decision of the State Court on a matter of state law. When a Federal Court so acts, it does so without authority and its order is a nullity.

It would seem that an appeal or writ of error is authorized by inference when the Congress in revising the removal statute eliminated the express prohibition against writ of error or appeal which had been in existence and cited by courts as authority for refusing such writ of error or appeal for nearly 70 years. Further, the elimination of the provision providing for immediate execution

of the order of remand also indicates the intention of Congress not to permit a Federal District Judge to arbitrarily prevent a litigant from exercising his right to remove a cause of action as provided by statute. The complaint failed to state a cause of action against a resident citizen of the State of California.

It is respectfully requested that the order of remand be declared void, or in the alternative the same be vacated and the District Court be directed to proceed with the trial of the case.

Respectfully submitted,

ROBERT W. WALKER,

J. H. CUMMINS,

J. B. KRAMER,

Attorneys for Appellant.

No. 12169

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY
COMPANY,

Appellant,

vs.

CLARA BROWN, a minor, by JESSE J. BROWN, Her Guardian
ad Litem,

Appellee.

BRIEF ON MOTION TO DISMISS APPEAL AND APPELLEE'S BRIEF.

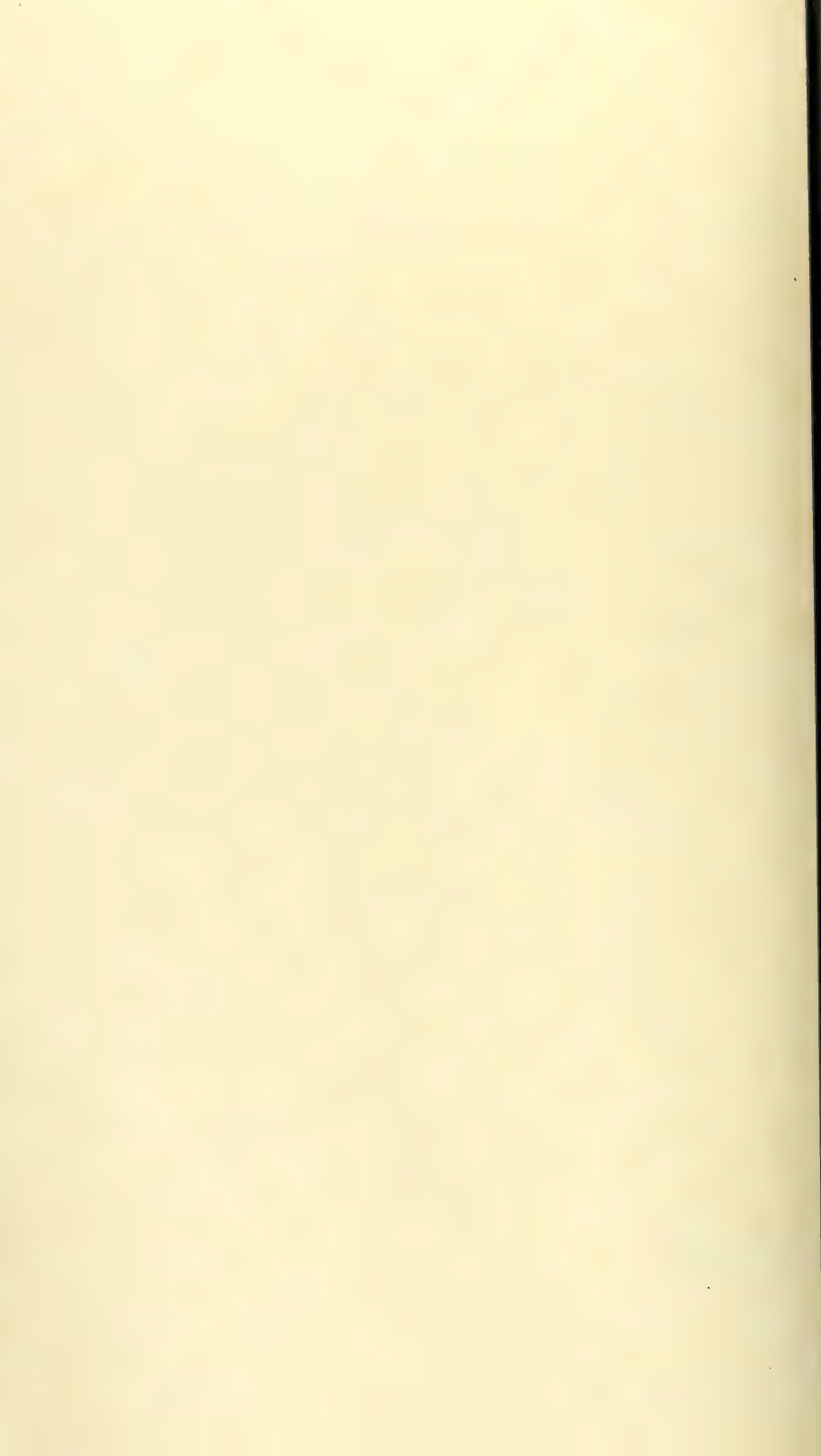
CLAUDE A. WATSON,
EDWARD P. HART and
SAMUEL P. YOUNG,

1230 West Second Street, Los Angeles 26,

Attorneys for Appellee.

FILED

MAY 21 1949



TOPICAL INDEX

	PAGE
Appellee's Brief on Motion to Dismiss Appeal.....	1
Statement of case.....	1
Points presented	2

I.

The filing and entering of the dismissal of the action herein in the State Court makes it unnecessary to consider the questions raised by this purported appeal. Such questions now are moot.....	3
The order of remand made and entered by the District Court and filed and entered in the State Court revested the State Court with sole and exclusive jurisdiction of this case	3

II.

The purported appeal should be ordered dismissed for the further reason that an order of remand is not an appealable order or decision.....	4
The cases cited by appellant in its brief are distinguishable and do not support appellant herein for the reason that in each case cited the appeal was from a final judgment entered subsequent to the order of remand. None of the cases cited present an appeal from an order of remand....	6
The United States Court of Appeals does not have jurisdiction over an attempted appeal from an order of remand....	6

ii.

	PAGE
Reply Brief	9
Questions presented	9

I.

An order of remand by a federal court is not an appealable order	9
--	---

II.

The District Court has exclusive power to determine that a case has been improperly removed to that court.....	11
--	----

III.

The original complaint states a cause of action against the resident defendants as well as against the nonresident appellant	12
--	----

TABLE OF AUTHORITIES CITED

CASES	PAGE
Barney v. Latham, 103 U. S. 205.....	12
Birdseye v. Shaeffer, 140 U. S. 117.....	6, 8
City of Louisa v. Levi, 140 F. 2d 668.....	6, 7
Employers Corporation v. Bryant, 299 U. S. 374.....	4
Gurnee v. Patrick County, 137 U. S. 141.....	6, 8
La Bourgogne, 210 U. S. 95.....	7
Matthew Addy Steamship, Ex parte, 256 U. S. 417.....	5
McAllister v. Chesapeake & O. R. Co., 243 U. S. 302, 61 L. Ed. 735	9
McLaughlin Bros. v. Hallowell, 228 U. S. 278.....	5
McLish v. Roff, 141 U. S. 661, 35 L. Ed. 893, 12 S. Ct. 118.....	10
Miller and Lux v. San Joaquin, etc. Co., 120 Cal. App. 589.....	13
Morgan v. Thompson, 124 Fed. 203.....	7
Moulding-Brownell Corp. v. Sullivan, 92 F. 2d 646.....	5
Mutual Life Ins. Co. v. Holly, 135 F. 2d 675.....	5
Nashville v. Cooper, 6 Wall. 248.....	7
Pullman Co. v. Jenkins, 305 U. S. 534.....	13
Railroad Co. v. Wiswall, 90 U. S. 507.....	4
Richee v. Gillette, etc. Co., 97 Cal. App. 365.....	12
Richmond & Danville R. Co. v. Thouron, 134 U. S. 45.....	6, 8
Rogers v. Watson, 46 F. 2d 753.....	10
Satterley, In re, 102 F. 2d 144.....	5, 10, 11
Scriven v. North, 134 Fed. 366.....	7
Skirvin v. Mesta, 141 F. 2d 668.....	7
Texas Land & Cattle Co. v. Scott, 137 U. S. 436.....	6, 8
Vietti, et al. v. Wayne, et al., 136 F. 2d 771.....	10
Wecker v. National Enameling & S. Co., 204 U. S. 176, 51 L. Ed. 430.....	9, 10

	PAGE
Wilson v. Republic Iron & S. Co., 257 U. S. 92, 66 L. Ed. 144	
.....	9, 10
Yankaus v. Feltenstein, 244 U. S. 127.....	5
Zadig v. Aetna Ins. Co., 42 F. 2d 142.....	10

STATUTES

Code of Civil Procedure, Sec. 581(1).....	3
Judiciary Act of 1875, Chap. 137, 18 Stats. 471.....	4
United States Code, Title 28, Sec. 71.....	5
United States Code, Title 28, Sec. 1291	4, 7
United States Code, Title 28, Sec. 1292	4, 7
United States Code, Title 28, Sec. 1447(e).....	3, 8, 11

No. 12169

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY
COMPANY,

Appellant,

vs.

CLARA BROWN, a minor, by JESSE J. BROWN, Her Guardian
ad Litem,

Appellee.

BRIEF ON MOTION TO DISMISS APPEAL AND APPELLEE'S BRIEF.

APPELLEE'S BRIEF ON MOTION TO DISMISS APPEAL.

Statement of Case.

This is an attempted appeal from an Order of Remand made and entered by the United States District Court, Southern District of California, Central Division, after said Court ruled that the cause had been improperly removed to the District Court from the Superior Court of the State of California, in and for the County of Los Angeles. [Tr. of Record pp. 36-39.] The original complaint was filed in the State Court on January 29, 1947 [Tr. p. 5] for damages for injuries sustained by the *minor* plaintiff on June 13, 1946, who was then 15 years

of age, and named the appellant corporation, a resident of the State of Kansas, and T. F. Robinson, John Doe and Jane Doe [Tr. p. 2], employees of the appellant corporation and residents of the State of California, as defendants.

Upon motion of the appellant, made in the State Court, and without opposition on the part of the appellee, the cause was transferred by the State Court to the United States District Court. [Tr. pp. 16-17.] After several delays the cause was finally set for trial on December 14, 1948, at which time the District Court determined that the case had been improperly removed from the State Court [Tr. pp. 36-39], and that the District Court did not have jurisdiction, and upon those grounds ordered the case remanded to the State Court. [Tr. p. 30.] Accordingly this was done. After appellant commenced this appeal, appellee filed a dismissal without prejudice of said action, which was entered on the record of said State Court.

Points Presented.

A. THE DISMISSAL OF THE ACTION INVOLVED IN THIS PURPORTED APPEAL MAKES THE QUESTIONS RAISED BY APPELLANT HEREIN MOOT.

B. APPELLANT'S PURPORTED APPEAL SHOULD BE ORDERED DISMISSED FOR THE REASONS THAT THE PENDING ACTION HERE INVOLVED HAS BEEN DISMISSED AND FURTHERMORE AN ORDER OF REMAND IS A NON-APPEALABLE ORDER.

I.

The Filing and Entering of the Dismissal of the Action Herein in the State Court Makes It Unnecessary to Consider the Questions Raised by This Purported Appeal. Such Questions Now Are Moot.

The Order of Remand Made and Entered by the District Court and Filed and Entered in the State Court Revested the State Court With Sole and Exclusive Jurisdiction of This Case.

Title 28 U. S. C., Section 1447(e), provides, that after an order of remand is made:

“The State Court may thereupon proceed with such case.”

After the case was remanded by the District Court to the State Court, all subsequent proceedings therein were governed by the rules of pleading of the State Court. Under the applicable provisions of the State statutes a plaintiff may voluntarily dismiss an action at any time prior to the commencement of the trial thereon, without prejudice to the filing of a subsequent action on the same cause of action. Section 581(1) of California Code of Civil Procedure provides:

“An action may be dismissed in the following cases: 1. By plaintiff, by written request to the clerk, filed with the papers in the case, or by oral or written request to the justice where there is no clerk, at any time before the actual commencement of the trial,”

The original complaint which was filed in the State Court was filed January 29, 1947, covering a cause of action which arose June 13, 1946. The case was not set for trial until December 14, 1948, at which time the case did not go to trial but was remanded to the State Court.

II.

**The Purported Appeal Should Be Ordered Dismissed
for the Further Reason That an Order of Remand
Is Not an Appealable Order or Decision.**

A review of the history of the federal statutes on removal will show conclusively that no right to appeal from an order of remand exists under the present statute. (28 U. S. C. 1291, 1292.)

The first statute providing for a remand by the Circuit Court (now District Court) to the State Court also provided for an appeal or writ of error to the Supreme Court from an order remanding the case. (Judiciary Act of 1875, Chapter 137, 18 Stats. 471.)

Prior to the Judiciary act of 1875, no appeal or writ of error was permitted from an order of remand because such an order was not a final decree or judgment.

In *Railroad Co. v. Wiswall*, 90 U. S. 507 (1874), the Court said:

“The order of the Circuit court remanding the cause to the State court is not a ‘final judgment’ in the action, but a refusal to hear and decide.”

The remedy is not by writ of error.

In *Employers Corporation v. Bryant*, 299 U. S. 374, at page 378, the Court states:

“For a long period an order of a federal court remanding a cause to the State court whence it had been removed could not be reexamined on writ of error or appeal, because not a final judgment or decree in the sense of the controlling statute.”

The right of appeal from such an order was subsequently removed by statute: Title 28 U. S. C., Section 71 (1887):

“ . . . and no appeal or writ of error from the decision of the District Court so remanding such cause shall be allowed. . . . ”

The following cases followed this statute:

Yankaus v. Feltenstein, 244 U. S. 127;

McLaughlin Bros. v. Hallowell, 228 U. S. 278;

Ex Parte Matthew Addy Steamship, 256 U. S. 417;

In re Satterley, 102 F. 2d 144;

Mutual Life Ins. Co. v. Holly, 135 F. 2d 675
(C. C. A.);

Moulding-Brownell Corp. v. Sullivan, 92 F. 2d 646
(C. C. A.).

Chronologically, prior to the re-enactment of Title 28 in 1948, the right to appeal from an order of remand has been as follows:

1) Prior to 1875 no right of appeal was ever allowed from an order of remand, there being no express statute allowing such appeal.

2) From 1875 to 1887 the right to appeal from such an order was expressly allowed and provided by statute.

3) From 1887 to 1948 the statute expressly provided that no appeal could be allowed from such an order.

4) In 1948 (Title 28) omitted the express provision prohibiting an appeal from an order of remand, and made no express provision regarding the same.

From the foregoing it follows that the right to appeal from such an order is governed by the same principles of law which governed such question prior to 1875, at which time no statute provided for or prohibited such an appeal, and at which time it was held without exception that no right of appeal or review of such an order can be allowed, for the reason that it is not a final order, etc. (See cases *supra*.)

The Cases Cited by Appellant in Its Brief Are Distinguishable and Do Not Support Appellant Herein for the Reason That in Each Case Cited the Appeal Was From a Final Judgment Entered Subsequent to the Order of Remand. None of the Cases Cited Present an Appeal From an Order of Remand.

An order of remand, or refusal to remand, has uniformly been held as not being a final judgment:

Richmond & Danville R. Co. v. Thouron, 134 U. S. 45;

Texas Land & Cattle Co. v. Scott, 137 U. S. 436;

Gurnee v. Patrick County, 137 U. S. 141;

Birdseye v. Shaeffer, 140 U. S. 117, and cases too numerous to mention.

The United States Court of Appeals Does Not Have Jurisdiction Over an Attempted Appeal From an Order of Remand.

The jurisdiction of the federal courts, excepting the Supreme Court, are entirely statutory. As stated in *City of Louisa v. Levi*, 140 F. 2d 668:

“The jurisdiction of the Circuit Court of Appeals is purely statutory and such courts are without authority to review by appeal any decision of the District Court which is not a final decision . . .”

The appellate jurisdiction of the Circuit Court of Appeals is limited to causes provided by Statute:

Skirvin v. Mesta, 141 F. 2d 668.

This limitation on the jurisdiction of the federal courts has existed and has been recognized since the inception of the inferior federal courts, as stated in *Nashville v. Cooper*, 6 Wall. 248:

“As regards all courts of the United States, inferior to this tribunal, two things are necessary to create jurisdiction, whether original or appellate. The Constitution must have given to the court the capacity to take it, and *an act of Congress must have supplied it*. Their concurrence is necessary to vest it.” (Emphasis added.)

The appellate jurisdiction of the United States Court of Appeals is now expressly limited to final decisions of the District Courts and certain interlocutory decisions not applicable here.

28 U. S. C., Section 1291;

28 U. S. C., Section 1292.

“An order, judgment or decree which leaves the rights of the parties to the suit undetermined and subject to further litigation—is not a final decision and the Circuit Court of Appeals have no jurisdiction to review it.”

Morgan v. Thompson, 124 Fed. 203;

Scriven v. North, 134 Fed. 366.

“A final judgment is one which disposes of the whole subject, gives all the relief that was contemplated, provides with reasonable completeness, for the giving effect to the judgment and leaves nothing to be done in the cause save to superintend, ministerially, the execution of the decree.”

City of Louisa v. Levi, 140 F. 2d 512;

La Bourgogne, 210 U. S. 95.

No order of dismissal, nor any other final order or decision was ever made in the present case. Nor was any order or decision ever made which would in any way prevent the plaintiff from dismissing the present action or filing a new complaint, or proceeding with the present case. The only effect of the order of remand was to send the case back to the State Court. Thereafter the State Court retained exclusive jurisdiction and the Federal Court has no authority to make any further orders in said action. This conclusion is inescapable from the provisions of 28 U. S. C. Section 1447(e) that "The State Court may thereupon proceed with such case." If the order of remand could be held to terminate the case nothing would remain upon which the State Court could act.

An order of remand, or refusal to remand, have been uniformly held not to be final decisions within the meaning of general appellate jurisdictional requirements:

Richmond & Danville R. Co. v. Thouron, 134 U. S. 45;

Texas Land & Cattle Co. v. Scott, 137 U. S. 436;

Gournee v. Patrick County, 137 U. S. 141;

Birdseye v. Shaeffer, 140 U. S. 117; and other cases too numerous to mention here.

For the foregoing reasons appellee respectfully submits that the purported appeal herein should be dismissed forthwith, and appellee awarded her costs.

B.

In the event that the foregoing motion to dismiss the appeal pending herein is denied, appellee presents herewith her reply brief:

REPLY BRIEF.

Questions Presented.

- I. Is an Order to Remand an appealable order?
- II. Does the District Court have the power to determine that a case has been improperly removed to that court?
- III. Does the original complaint filed in the within action state a cause of action against a resident defendant?

I.

An Order of Remand by a Federal Court Is Not an Appealable Order.

In support of the question presented under this head, appellee refers to and incorporates herein the matters set out at length *infra* under Paragraph II of her brief in support of her Motion to Dismiss Appeal.

We will now briefly point out conclusively that the authorities cited by appellant in support of this purported appeal are not in point and are distinguishable from the instant case.

Appellant appears to concede that an "order of remand" is not appealable, but appellant erroneously claims that "a refusal to order a remand" has been held to be appealable, and cites (p. 4 of brief):

Wecker v. National Enameling & S. Co., 204 U. S. 176, 51 L. Ed. 430, 434;

Wilson v. Republic Iron & S. Co., 257 U. S. 92, 66 L. Ed. 144, 148;

McAllister v. Chesapeake & O. R. Co., 243 U. S. 302, 61 L. Ed. 735, 738.

In each of these aforementioned cases the appeal was not from the refusal to remand, but the appeal was from and after a judgment of dismissal of the actions, the dismissal having resulted from failure to prosecute further after the parties had refused to submit to the jurisdiction of the District Court.

Appellant also cites authorities (pp. 7 and 8) and erroneously contends that these cases hold that an order of remand is a final order. However, these cases merely hold that the dismissal which occurred in each case is the "final" order, *not the remand order*.

Wecker v. National Enameling & S. Co. (supra);

Wilson v. Republic Iron & S. Co. (supra);

McLish v. Roff, 141 U. S. 661, 35 L. Ed. 893, 12 S. Ct. Rep. 118;

Zadig v. Aetna Ins. Co., 42 F. 2d 142;

Vietti, et al. v. Wayne, et al., 136 F. 2d 771;

Rogers v. Watson, 46 F. 2d 753, at page 754.

The case of *In re Satterley*, 102 F. 2d 144, cited by appellant (p. 8), does not hold that an order of remand is a decision on the merits, as claimed by appellant herein. A mere reading of the opinion will reveal that the opinion holds that the trial judge's order of remand is not reviewable, "whether correct or incorrect," and *that the trial judge is presumed to have considered the question of remand on its merits*. Nothing contained in that decision purports to hold that a remand order is a final judgment on the merits of the case. As appears at page 144, the opinion states:

"Whether correct or incorrect, the district judge expressed his opinion that the case was not one proper for removal, and his judgment of remand went upon the merits. That judgment is not reviewable in this court by any form of procedure." (Emphasis ours.)

No other cases are cited by appellant.

II.

The District Court Has Exclusive Power to Determine That a Case Has Been Improperly Removed to That Court.

The contention of appellant under Paragraph II (page 9) of its opening brief that a Federal District Court does not have the power to determine that a cause has been improperly removed to that court, and upon that ground to remand the cause to the State Court, would have the effect of nullifying the provisions of the remand statute (28 U. S. C., Section 1447) and of compelling the District Court to proceed with cases over which it did not have jurisdiction. The applicable portions of that statute are not subject to that construction.

Title 28 U. S. C., Section 1447(e) provides:

“If at any time before final judgment it appears that a case was *removed improvidently and without jurisdiction*, the District Court shall remand the case. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.” (Emphasis added.)

To hold that the District Court is bound by an order of a State Court on the question of its jurisdiction would render the provisions of Section 1447(e), *supra*, completely inoperative. No such intent can be read into the act. In order to give full effect to this section the District Court must have and does have full power to determine whether a case has been removed properly and whether it has jurisdiction without regard to any previous decision of the State Court.

As pointed out *infra*, *In re Satterly*, 102 F. 2d 144, the District Court not only exercised the power of remand but such order was conclusive and not reviewable “whether correct or incorrect.”

III.

**The Original Complaint States a Cause of Action
Against the Resident Defendants as Well as
Against the Nonresident Appellant.**

The caption of the complaint names as defendants: "Atchison, Topeka & Santa Fe Railway Co., a corporation, T. F. Robinson, John Doe, Jane Doe, and Doe Company, a corporation" [Tr. p. 2], and in Paragraph V of said complaint it is alleged that "said defendant (appellant herein), through its agents, servants and employees, acting within the scope of their employment, so negligently, carelessly and recklessly operated a certain switch engine," etc.

It is respectfully submitted that from the foregoing it may reasonably be inferred that the named individual defendants are the same persons referred to as "agents, servants, and employees" of appellant.

In *Richee v. Gillette, etc. Co.*, 97 Cal. App. 365, the Court held.

"Where a fact is stated only inferentially and no demurrer is interposed, the pleading will be held good after judgment."

The form of the pleadings is immaterial. The Federal Court has the right to re-examine the pleadings. In *Barney v. Latham*, 103 U. S. 205, at page 216, the Court, in considering the pleadings, said:

"Those are matters more properly for the determination of the trial court, that is, the Federal Court, after the cause is there docketed."

The question of the form of the complaint to state a cause of action can only be raised by special demurrer.

In *Miller and Lux v. San Joaquin, etc. Co.*, 120 Cal. App. 589, the Court states the general rule:

“A general demurrer or objection to the admission of evidence under a pleading on account of its insufficiency as a pleading does not reach facts *defectively* stated or those set forth by way of inference or argument, but only the entire absence of any essential fact.”

Such defects can be raised only by special demurrer.

The question presented upon a petition for removal of an action from a State Court to the Federal Court is not the sufficiency of the form of plaintiff's complaint but whether the complaint sets forth a separable controversy between citizens of different states. If one of the defendants may be a resident of the State a non-separable controversy is presented and the case cannot properly be removed to the Federal Court:

Pullman Co. v. Jenkins, 305 U. S. 534.

Nowhere in the record does it appear and appellant does not claim that the appellant's employees, T. F. Robinson, John Doe and Jane Doe, were non-residents. It is respectfully submitted from the foregoing that the present case was improperly removed to the District Court and the remand order was properly made, and should be affirmed.

Respectfully submitted,

CLAUDE A. WATSON,
EDWARD P. HART and
SAMUEL P. YOUNG,

By SAMUEL P. YOUNG,

Attorneys for Appellee.



No. 12169

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY
COMPANY,

Appellant,

vs.

CLARA BROWN, a Minor, by JESSE J. BROWN, Her
Guardian *ad Litem*,

Appellee.

APPELLANT'S REPLY BRIEF.

ROBERT W. WALKER,

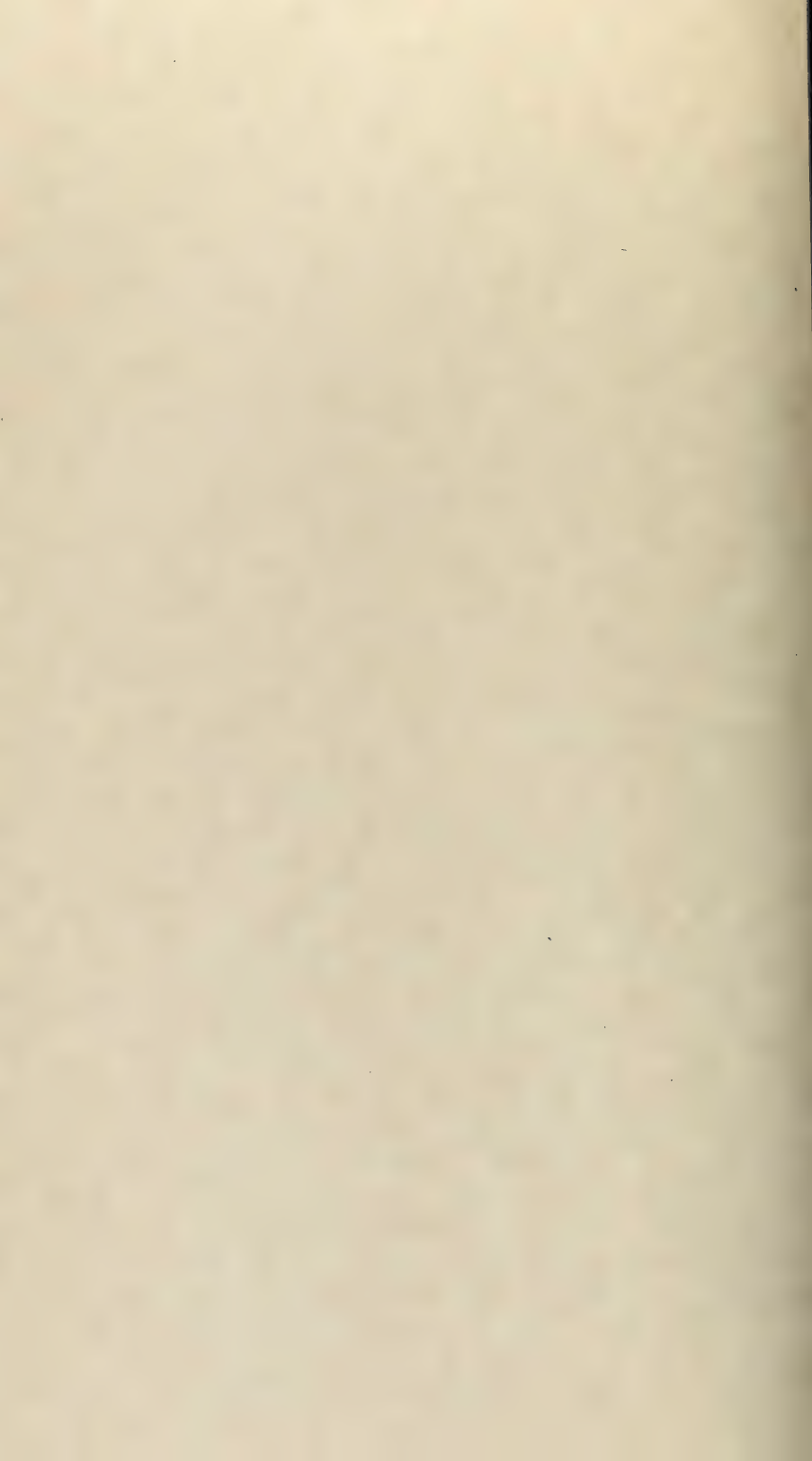
J. H. CUMMINS,

J. B. KRAMER,

448 Santa Fe Building, Los Angeles 14,

Attorneys for Appellant.

JUN 17 1949



TOPICAL INDEX

PAGE

Statement of the case.....	1
Answering Appellee's I. On motion to dismiss appeal.....	1
Answering Appellee's II. On motion to dismiss appeal.....	3
Answering Appellee's I. Brief on appeal.....	7
Title 28, U. S. C., Section 1447 and Section 39, which revised and repealed Title 28, U. S. C. A., Sections 71 and 72, had the effect of removing the statutory limitation heretofore in effect prohibiting appeal or writ of error from an order of the Federal District Court, remanding a case to the State Trial Court	12
The complaint at the time the petition for removal was filed, failed to state a cause of action against a resident or citizen of California	14
Conclusion	17
Appendix "A." Affidavit of J. B. Kramer.....	App. p. 1

TABLE OF AUTHORITIES CITED

CASES	PAGE
Brown v. Sweet, 95 Cal. App. 117.....	15
Campbell v. Jones, 38 Cal. 507.....	15
Chicago & Alton R. R. Co. v. Wiswall (23 Wall. 507), 90 U. S. 507, 23 L. Ed. 103.....	6
Employers Reinsurance Corp. v. Bryant, 299 U. S. 374, 81 L. Ed. 289.....	10, 11, 13
Hawley Bros. etc. Co. v. Brownstone, 123 Cal. 643.....	15
Lester v. Isaac, 63 Cal. App. 2d Supp. 851.....	15
Liberty Mutual Insurance Company v. Pillsbury, 154 F. 2d 559	4, 5
McAllister v. Chesapeake & O. R. Co., 243 U. S. 302, 61 L. Ed. 735	7, 9
McDonough v. Waxman, 103 Cal. App. 169.....	15
Metropolitan Casualty Insurance Co. v. Stevens, 312 U. S. 563, 85 L. Ed. 1044.....	8
Moore v. Bessee, 30 Cal. 570.....	15
Morton v. Shannon, 26 Cal. App. 689.....	15
Murdock v. Mayor, etc., 87 U. S. 590, 22 L. Ed. 429.....	13
Pennsylvania Co., Ex parte, 137 U. S. 451, 34 L. Ed. 738.....	10, 12
People v. Jones, 123 Cal. 299.....	15
Reconstruction Finance Corp. v. Katz, 156 F. 2d 215.....	4
Reeves v. Beardall, 316 U. S. 283, 86 L. Ed. 1478.....	3
Richee v. Gillette, etc., 97 Cal. App. 365.....	15, 16
Robinson v. Whaley Farm Corp., 120 Tex. 633, 37 S. W. 2d 714	13
Schell v. Food Machinery Corp., 87 F. 2d 385.....	9
Stewart v. Kahn, 78 U. S. 493, 20 L. Ed. 176.....	13
Stringer v. Davis, 30 Cal. 318.....	15
Texas Land & Cattle Co. v. Scott, 137 U. S. 436.....	6

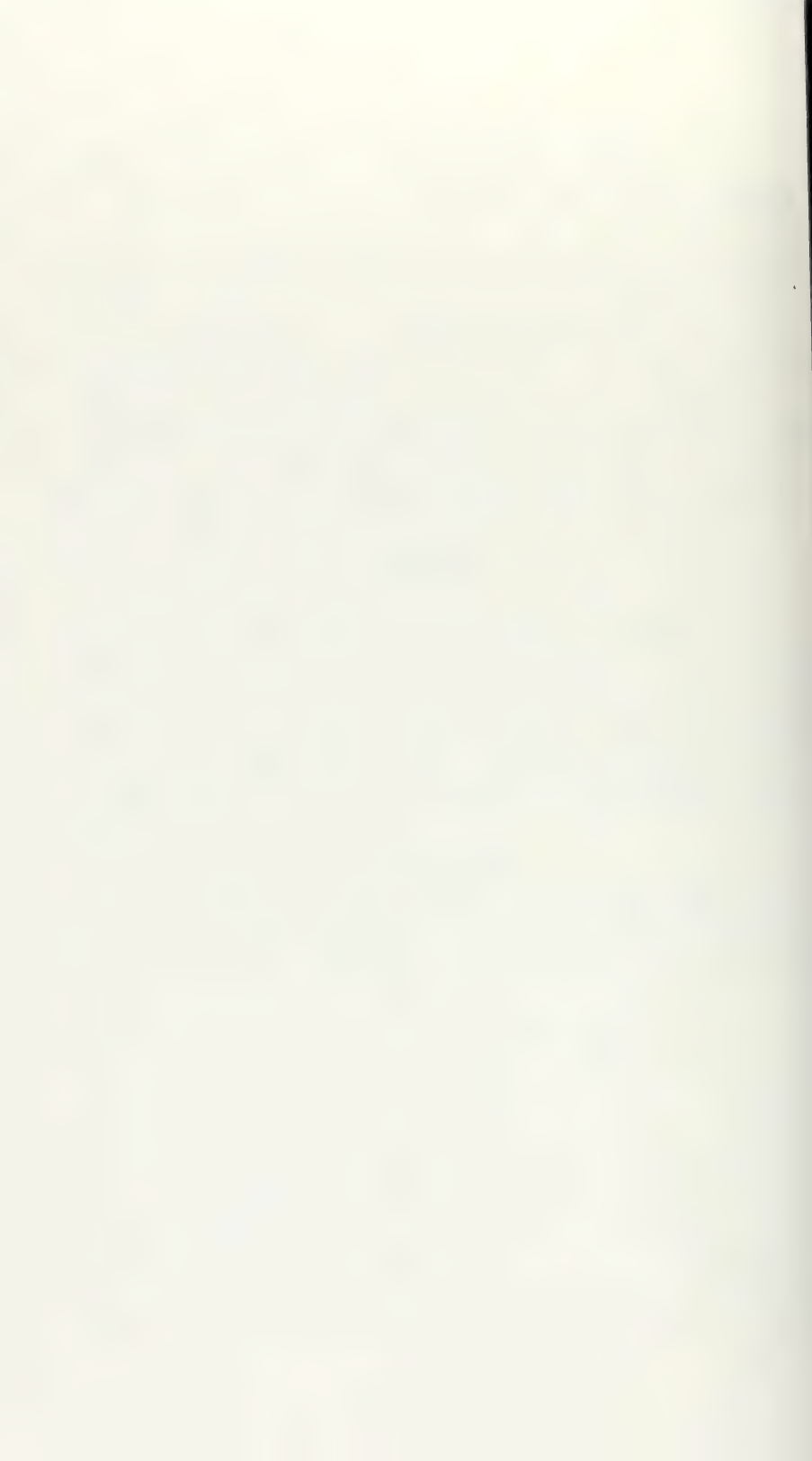
The Park Square Automobile Station, Ex parte, 244 U. S. 412, 61 L. Ed. 1231.....	8
United States ex rel. Baldwin Co. v. Robertson, 265 U. S. 168, 68 L. Ed. 962.....	5
Wecker v. National Enameling & S. Co., 204 U. S. 176, 51 L. Ed. 430.....	7
Wilson v. Republic Iron & S. Co., 257 U. S. 92, 66 L. Ed. 144....	7
Worden v. Searls, 121 U. S. 14, 30 L. Ed. 853.....	10
Wright v. Gibson, 128 F. 2d 865.....	4

STATUTES

Act of March 3, 1887, Chap. 373, 24 Stat. 553 (28 U. S. C. A., Secs. 71, 72).....	12
Federal Rules of Civil Procedure, Rule 62.....	2
United States Code Annotated, Title 28, Sec. 39.....	17
United States Code Annotated, Title 28, Sec. 1447.....	11
United States Code, Title 28, Sec. 71.....	8, 9, 10, 12

TEXTBOOKS

8 Bancroft's Code Practice and Remedies, Sec. 6269.....	4
10 Cyclopedia of Federal Procedure (2d Ed.), Sec. 4839.....	3



No. 12169

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY
COMPANY,

Appellant,

vs.

CLARA BROWN, a Minor, by JESSE J. BROWN, Her
Guardian *ad Litem*,

Appellee.

APPELLANT'S REPLY BRIEF.

Statement of the Case.

The statement of the case by the appellee conforms to that of the appellant except in the following particulars:

- (1) An appeal was perfected, not merely attempted;
- (2) The case was removed from the State Court upon petition for removal and not by motion.

ANSWERING APPELLEE'S I.

On Motion to Dismiss Appeal.

The points and authorities in contradiction to this issue of appellee are set out in the points and authorities filed by appellant in opposition to appellee's motion to dismiss appeal, therefore only a few generalizations will be made here in summary. Whether the dismissal was effected is

a matter to be determined by this Court. If the appeal is properly taken, then no court save this Court has the authority to act upon the case. If the appeal is not properly taken, the dismissal still may not be effective if it is determined that the District Court acted wholly without jurisdiction in entering the order of remand.

A certified copy of the order of remand was filed in the State Court on the date that the order of remand was entered in the District Court. This did not allow the appellant herein the ten days as provided by the Federal Rules of Civil Procedure in respect to final orders (Rule 62). It would not seem that the appellee should be in a better position as a result of a rule violation than if the rules had been followed. The appellant therefore was not in a position to secure a supersedeas assuming such action were required; however, it would not seem that supersedeas would be required in any event since such a bond would only prevent execution of the judgment and would have nothing to do with the validity thereof. Whether the State Court could effectively dismiss the case would depend upon the validity of the order of remand and if that order should fail by reason of a reversal on appeal, the source of the State Court's jurisdiction would be defective and any dismissal filed would be without effect. In conclusion, it would seem that not only is a trial court deprived of jurisdiction of a case when same is on appeal but in any event the action of one jurisdiction may not deprive a court in another jurisdiction of its power over a case, assuming that the case is properly before the latter court. It is readily seen that if such were the case, appeals could at any time be terminated or rendered moot, as the appellee contends, by the filing of a dismissal by the plaintiff in the trial court and the plaintiff may then start again.

ANSWERING APPELLEE'S II.

On Motion to Dismiss Appeal.

Appellee contends that the order of remand is not a final order.

Before discussing the issue, it is believed that a few definitions may serve to clarify the problem. The following definitions are taken from *Cyclopedia of Federal Procedure*, 2nd Edition, Vol. 10, Section 4839:

“A final judgment, it is sometimes said, is one that puts an end to the controversy between the parties litigant, disposing of the whole merits of the controversy or of some independent, unrelated portion thereof, leaving nothing to be judicially determined, with nothing remaining to be done but to enforce by execution what has been determined. Another way of stating it is that a judgment is final for the purpose of appeal when it terminates the litigation on the merits and leaves nothing to be done but to enforce by execution what has been determined; so that if there should be an affirmance by the reviewing court, the court below would have nothing to do but to execute the judgment or decree it had already rendered. In short, a final and appealable adjudication is one which involves a determination of a substantial right against a party in such a manner as leaves him no adequate relief, except by recourse to an appeal.”

A judgment may be final and appealable having terminated the action as to one claim, and therefore appealable, although there may remain other claims yet to be determined.

Recves v. Beardall, 316 U. S. 283, 86 L. Ed. 1478.

This Honorable Court has defined a final order in the case of *Reconstruction Finance Corp. v. Katz*, 156 F. 2d 215, page 217, as follows:

“The test of finality of a decision other than in the excepted cases is whether an affirmance by the appellate court will end the suit and leave nothing for the lower court to do but execute the decree.
* * * A judgment or decree which leaves the rights of the parties affected by it undetermined and *open to further litigation* is not a final decision.”
(Italics ours.)

The case of *Wright v. Gibson*, 128 F. 2d 865, decided by this Honorable Court, held that an order or judgment dismissing an action was a final order. The Court distinguished an order granting the motion to dismiss from the order of dismissal holding only the latter to be the final order. If we compare the above case with the case now before this Court, we find that the Court not only granted the order of remand but entered the order, and thereupon and on the same day, a copy thereof was sent to the Clerk of the State Court. In accord, see also the case of *Liberty Mutual Insurance Company v. Pillsbury*, 154 F. 2d 559.

The purpose behind the rule limiting appeals to final judgments is to avoid a multiplicity of appeals. This rule is commented upon by Bancroft's Code Practice and Remedies, Vol. 8, Section 6269 as follows:

“Any other rule would enable a litigant to have his rights adjudicated piecemeal, besides delaying

the trial of the cause, and this the courts will not permit unless clearly sanctioned by legislative enactment.”

When we apply this principle of law to the case at bar, we find not only is piecemeal appeal being avoided, but that the appellant may well lose its right to appeal by not appealing at this time, as was done in the case of *Liberty Mutual Insurance Company v. Pillsbury, supra*. Another common test of finality, whether anything further is contemplated, is met in this case. The order of remand not only having been entered but a copy thereof having been mailed to the Clerk of the State Court on the date the order was entered, no further action is to be anticipated by the Federal District Court.

It would seem that a dismissal by a court of a cause for lack of jurisdiction may be compared to a remand by a court for lack of jurisdiction, both from a practical as well as from a legal standpoint. The case of *United States ex rel. Baldwin Co. v. Robertson*, 265 U. S. 168, 68 L. Ed. 962, is a case in which the Supreme Court held that a decree dismissing a bill for lack of jurisdiction is a final decree. In each circumstance the Court determined that it was without jurisdiction to litigate the case. We are concerned only with the disposal; in one instance it is sent to another court, and in the other it is merely stricken from the calendar.

Appellant contends that an order of remand or refusal to remand has uniformly been held not to be a final judgment (Appellee's Brief p. 6). The cases cited

do not refer to a refusal to remand but do with the exception of the case of *Texas Land & Cattle Co. v. Scott*, 137 U. S. 436, consider the question of whether an order of remand is a final order. This point has been discussed by appellant in its Opening Brief Point I, beginning on page 3. It is believed that some elaboration will be of assistance. The cases cited by appellee all refer back to the case of *Chicago & Alton R. R. Co. v. Wiswall* (23 Wall. 507), 90 U. S. 507, 23 L. Ed. 103. The statute with reference to removal proceedings at the time of the decision in that case made no provision for remand and, as previously pointed out, the order of the Circuit Court now District Court, remanding the case served merely to inform the State Court that the Federal Court intended to take no further action. Because the case was neither decided by the Federal Court nor dismissed it in effect remained in the Court undecided and therefore the remedy as stated by the *Wiswall* case was correctly that of mandamus. But since the statute of 1875 there has always been a statutory provision authorizing a remand and therefore the order of remand not only announces the decision of the District Court but in effect moves the case from the District Court to the State Court and is a disposition of the case, assuming of course, that the order of remand is valid.

ANSWERING APPELLEE'S I.

Brief on Appeal.

In answer to the contention of the appellee that an order of remand is not a final order, the following additional material is offered.

There has never been a statutory prohibition of an appeal or writ of error from an order of the Federal District Court refusing to remand a case to the State Court and appellate review of such orders has been and is allowed.

The above proposition was stated in substance in the appellant's opening brief, page 4, in the following words:

"It will be noted here that there was no prohibition for an appeal or writ of error for refusing to remand a case and such appeal or writs of error have been effected."

The following three cases were cited as authority for the statement:

Wecker v. National Enameling & S. Co., 204 U. S. 176, 51 L. Ed. 430, 434;

Wilson v. Republic Iron & S. Co., 257 U. S. 92, 66 L. Ed. 144, 148;

McAllister v. Chesapeake & O. R. Co., 243 U. S. 302, 61 L. Ed. 735, 738.

The appellee took exception to the proposition (Appellee's Brief p. 10) in the following language:

"In each of these aforementioned cases the appeal was not from the refusal to remand, but the appeal was from and after a judgment of dismissal of the

actions, the dismissal having resulted from failure to prosecute further after the parties had refused to submit to the jurisdiction of the District Court.”

It is quite apparent that the purpose for which appellant cited these cases has been misunderstood and a more detailed analysis is required. Appellant does not question the fact that the appeals were taken from the orders of dismissal. The appeal could not have been taken from the order refusing to remand as such an order is interlocutory; however, it will be noted that the appellate review was concerned with the validity or the correctness of the order refusing to remand. The Federal Courts were precise in holding that they have the power and will exercise appellate review of an order refusing to remand a case when that case is brought before the appellate court, either following an order of dismissal or any other final order. The review would culminate in an affirmance or reversal on the jurisdictional issue raised by the refusal to remand. In this connection see also case of *Ex parte The Park Square Automobile Station, Petitioner*, 244 U. S. 412, 61 L. Ed. 1231.

In contrast to the affirmative action taken by the appellate court on *orders refusing to remand*, the appellate courts refused to review an *order remanding* a case irrespective of the manner in which the case is brought before the appellate court. Justice Murphy, in the case of *Metropolitan Casualty Insurance Co. v. Stevens* (1941), 312 U. S. 563, 85 L. Ed. 1044, draws the distinction in this respect between an *order remanding* the case and an *order refusing to remand*. The opinion is a brief and concise analysis of that portion of the old removal statute, 28 U. S. C., Section 71, with which we are now concerned. The rule prohibiting appellate review of an order

of remand is stated by Justice Murphy on page 565, and the rule providing that an appellate review may be had of an order refusing a remand is set out on page 567. See also:

Schell v. Food Machinery Corp., 87 F. 2d 385, page 386.

Discussing the distinction in the opening brief, appellant was not concerned with whether as a matter of law either of the two orders compared was a final order or interlocutory order, but was only concerned with the fact that the appellate court would review the one and would not review the other. The comment was directed primarily to that portion of old 28 U. S. C. A. 71, which prohibits appellate review.

The Circuit Court has in the past clearly postured the case for the Supreme Court. To illustrate this observation the attention of the Court is invited to the decision of *McAilister v. Chesapeake & O. R. Co.*, *supra*. The Court states that the issue is not whether the case was properly dismissed but whether the order refusing to remand was a proper order as a matter of law, and did the District Court have jurisdiction. The Supreme Court referring to the opinion of the Circuit Court states at page 305:

“On the next day the district judge allowed a writ of error to this court in an order reciting that plaintiff’s petition ‘had been dismissed by the judgment of this court upon consideration solely of the question of this court’s jurisdiction of the action.’”

The District Court made it clear that it considered only the jurisdictional question of refusing to remand even though the case had been pending before it for fifteen years.

Let us next analyze the distinction between the two types of orders, remand and refusal to remand, as the distinction may have been effected by the former removal statute, 28 U. S. C. A. 71. In brief, the statute prohibited an appeal or writ of error from an order of remand and required that the remand be immediately carried into execution. The statute as applied produced two results:

(1) An appeal or writ of error could not be taken from the order of remand.

(2) The order of remand was not subject to appellate review.

The first result is quite clear from the wording of the statute. The second result was not clear to the legal profession until after the case of *Ex parte Pennsylvania Co.*, 137 U. S. 451, 34 L. Ed. 738, reaffirmed and restated by the Supreme Court in the case of *Employers Reinsurance Corp. v. Bryant*, 299 U. S. 374, 81 L. Ed. 289.

These cases refused the writ of mandamus for the reason and on the principle that appellate review of the order of remand was suspended or cut off by the statute, basing this conclusion in part on the phrase which directed that the order of remand be immediately executed, and also to carry out the apparent intent of Congress.

It is not surprising that there would be considerable legal opinion to the effect that an order of remand was not a final order because the Statute suspended one of the attributes normally found in a final order, namely, appealability. This conclusion is believed to result from an inadequate consideration of whether an order is final or interlocutory since it is generally conceded that it must be either one or the other. *Worden v. Searls*, 121 U. S. 14, 30 L. Ed. 853. It will be noted that the case of

Employers Re-Insurance Corp. v. Bryant, 299 U. S. 374. 81 L. Ed. 289, cited by appellee, on page 4, as holding a remand not be a final order is actually a qualified statement. The holding of the Court is qualified by the very point now under examination, namely, "in the sense of the controlling statute." One must conclude that the Supreme Court did not wish to make a statement that the order was not final as such but only not to be final in the sense of the controlling statute, which statute has now been repealed. Appealable orders are final. Final orders are appealable. It does not follow, however, that appealability is the sole test for you cannot say that all appealable orders are final or that all final orders are appealable. There are several interlocutory orders which by statute are appealable and by following the line of reasoning believed to be faulty the interlocutory order would therefore be considered final which is obviously not true. The statute did not state that an order of remand was not a final order and therefore the determination of its final or interlocutory character must be determined by the usual tests applied to orders. These tests were never previously applied probably because the question was moot. The appeal and writ of error of an order of remand were prohibited by Statute and therefore the finality of the order was not material to a determination.

The statute as it now reads, 28 U. S. C. A. 1447, does not prohibit appeal by express prohibition, or suspend appellate review by the phrase "such remand shall be immediately carried into execution." We are thus concerned with the finality of the order only insofar as the timeliness in taking the appeal is concerned. The question is, should the appeal be taken when the order of remand is issued or at a later date, and not whether such

an order is not subject to appellate review. Since the Court previously did not refrain from its appellate review of orders refusing to remand when the appellate review of such order was not expressly prohibited, we must conclude that under the present statute when such orders of remand are not expressly prohibited the power clearly lies in the Court and we are only concerned with the procedural aspect.

28 U. S. C., Section 1447 and Section 39, Which Revised and Repealed 28 U. S. C. A., Sections 71 and 72, Had the Effect of Removing the Statutory Limitation Heretofore in Effect Prohibiting Appeal or Writ of Error From an Order of the Federal District Court, Remanding a Case to the State Trial Court.

Soon after the original Statute prohibiting appeal or writ of error had been enacted, the Supreme Court held that mandamus was likewise prohibited. This decision is a leading case on the problem, being *Ex parte Pennsylvania Co., supra*. The case involved a request for mandamus to be issued against the judges of the Circuit Court (now District Court) to command them to take jurisdiction of a case which had been remanded to the State Court. The Court after stating that mandamus had been the proper procedure in such a case (page 739) held that the matter was governed by statute, being the Act of March 3, 1887, Chapter 373, 24 Stat. 553. This was codified in 28 U. S. C. A. 71, 72. The Court repeated the following language of the Statute:

“such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed.”

The Court held that the abrogation of the writ of error and appeal would have little effect if mandamus were permitted. Particularly since the Statute also provided that the order should be carried out immediately. The Court appeared reluctant to limit the power of appellate review and did so only to carry out the apparent intention of Congress and to give effect to the words of the Statute above quoted. This case has been cited as authority since that time. A relatively recent case reaffirming the *Pennsylvania* case is that of *Employers Reinsurance Corp. v. Bryant, supra*.

It is a familiar rule of statutory construction that Congress is aware of the Court decisions upon a Statute and that a revision of the Statute eliminating certain provisions thereof upon which the Courts have relied and based their decisions is an expression on the part of Congress of an intention to change that portion of the law. *Stewart v. Kahn*, 78 U. S. 493, 20 L. Ed. 176, 178, states the rule as follows:

“It is a rule of law that where a revising Statute, or one enacted for another, omits provisions contained in the original Act, the parts omitted cannot be kept in force by construction, but are annulled.”
(Citing cases.)

In accord:

Murdock v. Mayor, etc., 87 U. S. 590, 22 L. Ed. 429, 438;

Robinson v. Whaley Farm Corp., 120 Tex. 633, 37 S. W. 2d 714.

**The Complaint at the Time the Petition for Removal
Was Filed, Failed to State a Cause of Action
Against a Resident or Citizen of California.**

Excluding the formal allegation of the complaint [Tr. par. II, p. 2] requesting permission to amend same by inserting the true name of the Doe defendants, there is no mention of any person or corporation in the complaint other than the defendant Railway, appellant herein, excepting that found in Paragraph V of the Complaint, pages 3 and 4 of Transcript of Record. The pertinent portions of Paragraph V read as follows:

“ . . . the defendant Atchison, Topeka & Santa Fe Railway Co. . . . said defendant, through its agents, servants and employees, . . . so negligently, carelessly and recklessly . . . ”

There is no allegation that the agents, servants and employees referred to were defendants or that they were the persons named in the caption of the complaint. The complaint merely alleged that the defendant Railway acted through its agents, servants and employees, which as a matter of fact is the only manner in which any corporation can act. Such pleading is merely a formal allegation of appellant's negligence.

The defendant Railway is set out in the singular and it is clearly not a clerical or grammatical error since the entire paragraph is in the singular.

Paragraph VI of the complaint found on page 4 of the transcript states:

“That by reason of the negligent acts of said defendant . . . ”,

which it is noted refers to the defendant (appellant herein) in the singular, and still refers only to the defendant Railway, making no mention of any other defendants or persons and no reference to the defendants named in the caption.

It is a familiar proposition of law that the caption of a case is no part of the complaint unless referred to by appropriate allegations in the body of the complaint.

Hawley Bros., etc. Co. v. Brownstone, 123 Cal. 643;

McDonough v. Waxman, 103 Cal. App. 169;

Morton v. Shannon, 26 Cal. App. 689.

No such reference is made anywhere in the complaint under question.

It is a general rule that material matters must be distinctly stated and may not be left to inference to be drawn from doubtful or obscure language. This proposition is a direct quote from page 123, from the case of *Brown v. Sweet*, 95 Cal. App. 117, and is a proposition of law with little dispute. The following cases support the proposition:

Campbell v. Jones, 38 Cal. 507;

Stringer v. Davis, 30 Cal. 318;

Moore v. Bessee, 30 Cal. 570;

People v. Jones, 123 Cal. 299;

Lester v. Isaac (1944), 63 Cal. App. 2d Supp. 851.

The case of *Richee v. Gillette, etc.*, 97 Cal. App. 365, is cited by appellee on page 12 of the brief, for the point

that where a fact is inferentially stated, and no demurrer is interposed, the pleading will be held good after judgment. This case is actually not in point with the propositions with which we are here concerned. There is no allegation in the case at bar from which an inference could be drawn. In the *Richee* case, the question was whether or not the sum of attorney's fees was stated with sufficient clarity. The Court pointed out that the sum asked was ten per cent of the amount found to be due on the principal and interest for attorney's fees. The uncertainty was more in the nature of an amount, which in any event, the Court was required to determine; the inference was not as to a material fact. Further, the cited case was one which arose after a judgment, and where the person requesting the relief might possibly be determined to have rested on his rights, whereas, in the case under consideration, the defendant and appellant herein, petitioned for removal at the earliest possible time.

On June 6, 1949, this Honorable Court granted appellant permission to have this brief considered as a part of the proceedings on the motion to dismiss the appeal in addition to being the Reply Brief. In this connection and in order to establish the fact that the order of remand was filed in the office of the County Clerk of the Superior Court, on the same day that it was entered, the affidavit of J. B. Kramer, attorney for the appellant is attached hereto as Appendix "A" and by this reference made a part hereof.

Conclusion.

It is believed that an order of the Federal District Court remanding a case to the State Court is an appealable order since the order is final. That the statutory prohibition against appeal or writ of error having been expressly repealed by Statute, 28 U. S. C. A., Section 39, there is no reason for not allowing appeal in the same manner as any other final order. If the Court finds that the Federal District Court acted entirely without jurisdiction in ordering the remand, then it is believed that the question of appealability will be satisfied by an order of the Circuit Court directing the District Court to proceed with the case on the theory that the action of the District Court was wholly void.

It is respectfully requested that the order of remand be declared void, or in the alternative the same be vacated and the District Court be directed to proceed with the trial of the case, and that Appellee's Motion to Dismiss the appeal be denied.

Respectfully submitted,

ROBERT W. WALKER,

J. H. CUMMINS,

J. B. KRAMER,

Attorneys for Appellant.



APPENDIX "A"

AFFIDAVIT OF J. B. KRAMER.

State of California, County of Los Angeles—ss.

J. B. Kramer, being duly sworn on oath, deposes and says: That he is one of the attorneys of record for the appellant in the above entitled action. That a certified copy of the order of remand entered by the Honorable Judge Ben Harrison [Tr. of Rec. p. 30] was filed with the Clerk of the Superior Court in and for the County of Los Angeles, State of California, on the 14th day of December, 1948.

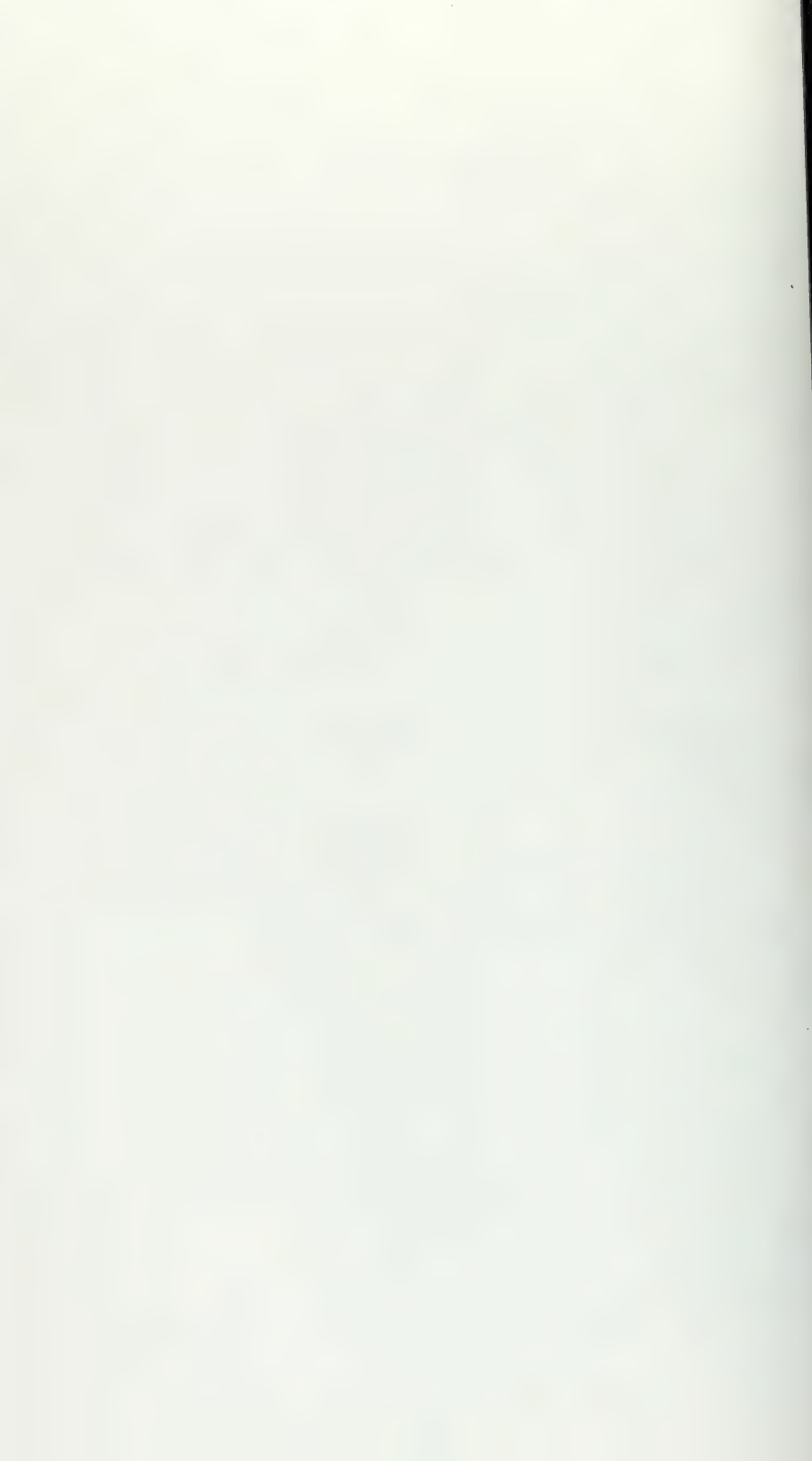
J. B. KRAMER.

Subscribed and sworn to before me this 16th day of June, 1949.

MARGUERITE F. CRIPPS,

Notary Public in and for Said County and State.

My Commission expires January 3, 1952.



No. 12170

United States
Court of Appeals

for the Ninth Circuit

PARAMOUNT PEST CONTROL SERVICE, a
corporation,

Appellant,

vs.

CHARLES P. BREWER, individually and doing
business as Brewer's Pest Control, ROSALIE
BREWER, his wife, RAYMOND RIGHT-
MIRE, CARL DUNCAN and EARL MER-
RIOTT,

Appellees.

Transcript of Record

In Three Volumes

VOLUME I.

(Pages 1 to 266, inclusive)

Appeal from the United States District Court
for the District of Oregon

FILED

APR 4 - 1949

PAUL R. O'BRIEN,

CLERK

No.12170

United States
Court of Appeals

for the Ninth Circuit

PARAMOUNT PEST CONTROL SERVICE, a
corporation,

Appellant,

vs.

CHARLES P. BREWER, individually and doing
business as Brewer's Pest Control, ROSALIE
BREWER, his wife, RAYMOND RIGHT-
MIRE, CARL DUNCAN and EARL MER-
RIOTT,

Appellees.

Transcript of Record

In Three Volumes

VOLUME I.

(Pages 1 to 266, inclusive)

Appeal from the United States District Court
for the District of Oregon

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

PAGE

Affidavit Counter to Charles P. Brewer's Affidavit	63
Affidavit in Response to Order to Show Cause..	58
Affidavit in Support of Motion for Restraining Order	42
Answer of Charles P. Brewer, et al.....	67
Answer of Charles P. Brewer to Interrogatories	45
Exhibit A—List of Customers and Patrons	47
Answer of Earl Merriott to Interrogatories.....	54
Answer of Raymond Rightmire to Interrogatories	56
Answer of Rosalie Brewer to Interrogatories...	52
Appeal:	
Clerk's Certificate to Transcript of Record on.....	91
Notice of.....	78
Statement of the Points on Which Appellant Intends to Rely on.....	537
Appellant's Designation of Additional Record.	87

INDEX	PAGE
Appellant's Designation of Record.....	85
Appellee's Designation of Additional Portions of the Record.....	86
Clerk's Certificate to Transcript of Record on Appeal	91
Complaint in Equity.....	2
Exhibit 1—Sales Agent's Agreement with Paramount Pest Control Service	29
Deposition of Charles P. Brewer:	
—direct	471
—cross	528
Docket Entries.....	88
Findings of Fact and Conclusions of Law.....	74
Conclusions of Law.....	76
Findings of Fact.....	74
Judgment	77
Memorandum Opinion.....	73
Motion for Restraining Order.....	41
Names and Addresses of Attorneys of Record.	1
Notice of Appeal.....	78
Order Denying Motion for Restraining Order.	67

INDEX	PAGE
Order Directing Transmittal of Original Exhibits	81
Order Relieving Appellant from Printing or Reproducing Exhibits.....	536
Order to Show Cause.....	43
Photostat Copy of Exhibit No. 77.....	82
Points on Which Appellant Intends to Rely...	78
Preliminary Memo.....	66
Proceedings of Trial.....	93
Witnesses for Defendants:	
Brewer, Charles P.	
—direct	264, 451
—cross	292, 462
—redirect	322, 465
Brewer, Rosalie	
—direct	440
—cross	446
—redirect	450
Merriott, Earl	
—direct	434
—cross	438
Rightmire, Raymond	
—direct	414
—cross	425

	INDEX	PAGE
Witnesses for Plaintiff:		
Brooks, DeGrey S.		
—direct	353
—cross	364
—redirect	368
—recross	369
Bushing, E. W.		
—direct	184
—cross	202
—redirect	204, 207
—recross	205
Conger, Allard J.		
—direct	323
—cross	329
—redirect	330
Fisher, C. W.		
—direct	338
—cross	351
Fisher, Glenn H.		
—direct	399
—cross	406
Hansen, G. H.		
—direct	331
—cross	334
—redirect	336
—recross	337

INDEX

PAGE

Witnesses for Plaintiff—(Continued):

Hilts, Harold W.

—direct207, 370

—cross253, 386

—redirect397, 398

—recross 398

Sibert, Theodore C.

—direct 113

—cross 172

Reply to Counter Claim..... 72

Statement of the Points on Which Appellant

Intends to Rely on Appeal; Designation of

Parts of Record to Be Printed..... 537



INDEX TO PROCEEDINGS IN DISTRICT COURT AFTER REMAND

	PAGE
Appeal:	
Certificate of Clerk to Transcript of Record on	556
Designation of Record on (DC)	555
Notice of	551
Order Based on Stipulation of Parties includ- ing Appeal No. 11892 in Transcript on....	560
Order Relieving Appellant from Printing or Reproducing Exhibits on	559
Statement of Points and Designation of Parts of Record on (USCA)	557
Statement of Points to be Relied Upon by Ap- pellant on (DC)	552
Certificate of Clerk to Transcript of Record on Appeal	556
Designation of Record on Appeal (DC)	555
Designation of Parts of Record to be Printed (USCA)	558
Findings of Fact and Conclusions of Law	544
Judgment	550

ii.

	PAGE
Memorandum Responding to Mandate to Make Additional Findings	542
Names and Addresses of Attorneys.....	539
Notice of Appeal	551
Opinion	540
Order Based on Stipulation of Parties includ- ing Appeal No. 11892 in Present Appeal....	560
Order Relieving Appellant from Printing or Re- producing Exhibits	559
Order Vacating Judgment of Feb. 14, 1948....	544
Statement of Points on which Appellant Intends to Rely (DC)	552
Statement of Points and Designation of Record (USCA)	557
Stipulation of Parties including Appeal No. 11892 in Present Appeal	561

NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

KENNETH C. GILLIS,
Central Bank Building,
Oakland, California

F. LEO SMITH,
Pacific Building,
Portland, Oregon

ROBERT R. RANKIN,
Yeon Building,
Portland, Oregon
For Appellant.

COLLIER & BERNARD,
WM. K. SHEPHERD,
EARL F. BERNARD,
Spalding Building,
Portland, Oregon.

PLOWDEN STOTT,
Yeon Building,
Portland, Oregon,
For Appellees.

In the District Court of the United States for the
District of Oregon

No. Civ. 3936

PARAMOUNT PEST CONTROL SERVICE,
a corporation,

Plaintiff,

vs.

CHARLES P. BREWER, individually and doing
business as Brewer's Pest Control, ROSALIE
BREWER, his wife, RAYMOND RIGHT-
MIRE, CARL DUNCAN, EARL MERRIOTT
and all other persons associated with said de-
fendants as herein described,

Defendants.

COMPLAINT IN EQUITY

Comes now plaintiff and for cause of suit against
defendants, complains and alleges:

I.

Plaintiff is a citizen of the State of California
and defendants are all citizens of and residents in
the State of Oregon. The matter in controversy is
the restraint of unlawful conduct performed by
the defendants within the District of Oregon, the
recovery of sums of money due the plaintiff, and for
damages by defendants, all of which exceeds, ex-
clusive of interest and costs, the sum of Three
Thousand (\$3,000.00) Dollars.

II.

Plaintiff was and at all times since July 1, 1946, has been and now is a private corporation, organized under and existing by virtue of the laws of the State of California, with a principal office and place of business in the City of Oakland, County of Alameda, State of California.

(a) On or about August 25, 1947, said plaintiff qualified to do business in the State of Oregon by filing a verified declaration of its desire and purpose to engage in business in said district and state, together with a duly authenticated copy of its Charter or Articles of Incorporation, and did appoint a general agent and statutory attorney-in-fact who is a citizen of and resident in Multnomah County, Oregon, and did pay a fee for the filing of its declaration and proportionate [1*] part of the annual license fee for the year ending June 30, 1948, all of which was so satisfactory in substance and form to the Corporation Commissioner of said State of Oregon, that said official did on or about August 25, 1947, issue to plaintiff, under his official hand and seal, a Certificate of Authority to engage in business within the State of Oregon, and said corporation did establish a branch office and place of business in the said City of Portland.

(b) In addition to the general powers granted to and vested in plaintiff by the statutes of the states in which it does business, said plaintiff is, among other things, particularly organized for and author-

* Page numbering appearing at foot of page of original certified Transcript of Record

ized by its Articles to carry on the business of structural pest control, make inspections, use insecticides, fumigants, or allied chemicals for the purpose of eliminating, exterminating or preventing infestation of insects, rodents and fungi and other pests invading households or structures, and to buy ingredients, manufacture chemicals and formulae, use and sell the same, together with all kinds of machinery or devices for carrying on the business of structural pest control, and to create and apply for licenses, trademarks and processes, to manufacture and sell all types of chemicals and chemical compounds used in said business, and generally to transact or carry on any other powers necessary, proper or convenient to carry into effect the foregoing purposes, including the establishment of branches in other states than California, and for more than a year last past said plaintiff has been engaged in the above described business in the State of Oregon.

(c) Plaintiff has at substantial expense, at great labor and research, coupled with untiring effort, assembled for its private and confidential use, a large number of most valuable and useful receipts and formulae known and used by plaintiff in its business, and has acquired valuable and technical knowledge and experience necessary and requisite for the proper combining, mixing and compounding of the same, and knowledge of dependable sources of supply for obtaining ingredients and the strength and value thereof. For the same period and in the same [2] manner and for the purpose of pest con-

trol, it has acquired extensive and valuable knowledge of various use of its products and the best means of distribution thereof to best control all kinds of pests in various localities, structures and places infested thereby which are dangerous to the life, health or property of customers of plaintiff, and said antecedent knowledge is essential to the successful conduct of such business and particularly that of plaintiff, and such knowledge is a valuable trade asset of plaintiff and is by plaintiff disclosed in whole or in a substantial part to its employees, including the defendants above named, at the commencement of and during their training in behalf of plaintiff's business.

(d) In order to carry on said business in a unique, sanitary, safe, efficient and exclusive manner, plaintiff does

(i) issue to all agents, employees and representatives certain rules and regulations regarding its employees, their conduct, the method of serving, chemicals and their use and care, and the names and addresses of accounts or parties whom the plaintiff is to serve and the contract to be made for their particular guidance in said business, and plaintiff does require its employees to secure from said customers certain written contracts for service of customers which, among other things, therein describe the pest to be eradicated or controlled, the price therefor and terms of payment and the period during which said service is to continue;

(ii) make written agreement, often termed a franchise, with its principal agent for the sole and exclusive service by said agent to plaintiff, which service is confined to a particular territory and fully defines the relationship, as more particularly hereinafter disclosed;

(iii) make agreements with its employees to the end that in view of their training by the plaintiff, said employees will not give out information regarding plaintiff's business, as is more fully hereinafter set forth, all of which procedure herein described was [3] followed and performed by plaintiff in establishing its herein described business in the state and district of Oregon;

(iv) services its patrons with what is colloquially called "one shot service," meaning isolated single service, or more often under written contracts giving the price, terms of payment, duration of service, pest to be controlled and period of service. Said contract service greatly exceeds the single shot service. All such procedure was instituted and practiced by plaintiff and subsequently usurped, instituted and practiced by said defendants in the State of Oregon.

III.

All of said defendants were to a greater or less extent materially familiar with plaintiff's business, as above described, and were associated together and more particularly identified in the public and customers' minds, as well as among themselves, with plaintiff's business in the following manner:

(a) On or about July 1, 1946, plaintiff employed and defendant Charles P. Brewer accepted and agreed to act as agent for plaintiff in the State of Oregon in the business aforesaid, under a sole and exclusive franchise to render service for and the sale and use of the products of plaintiff in the business aforesaid for a period of ten (10) years after said date, cancellable on ninety (90) days' written notice by either party, to the effect that the agent would devote the whole of his time, attention and energies to promote the interests of the company, to take all contracts for service in the name of the company, to purchase his stocks, merchandise and chemicals from the plaintiff, to procure the sales of products and promote the service of the plaintiff in the territory allotted and to hold confidential the information given him in connection with the plaintiff's business, to be responsible for all accounts and the collection thereof and not to directly or indirectly communicate or divulge to anyone or make use of any of the trade secrets, formulae, processing and service of plaintiff's business for the benefit of anyone other than the [4] plaintiff, and to pay a proportionate amount of the business to the plaintiff and upon the termination of this agreement and for a period of three (3) years thereafter to not directly or indirectly communicate or divulge to or make use of for the benefit of any person, partnership or corporation any of the trade secrets, formulas, processing methods of the company, or the names, addresses or requirements of any of the customers of the company, or any other information

relating to the company's business which he may have acquired or learned during his employment, and will not canvass, solicit or cater to any of the customers of the company which he may know of because of his employment by said company, which at all times herein mentioned refers to the plaintiff, and which agreement contained other provisions, as more fully set forth in that certain "Sales Agent's Agreement with Paramount Pest Control Service" dated July 1, 1946, made and entered into for a valuable consideration, with plaintiff therein called the "Company" and defendant Charles P. Brewer therein called the "Agent," and subsequently ratified and confirmed, of which agreement, also called "franchise," a substantial copy in words, letters and figures is hereto attached and its allegations by this reference incorporated herein and made a particular part of this paragraph of this complaint and for reference marked "Exhibit 1."

That said agreement was on the following dates in the following manner, verbally modified, ratified and augmented:

(i) Defendant C. P. Brewer and plaintiff, through its president, on or about September 20, 1946, at Portland, Oregon, at the special instance and request of defendant Brewer and on his representation that it was too difficult to expand said business and do all the things he wanted to do to make a success of said business in Oregon and yet pay to the plaintiff the 20% of the gross business done by the agent, as specified in said contract or franchise,

did orally agree to modify said franchise in the following particulars only, to wit:

That every time defendant C. P. Brewer took any money for his [5] personal use from the business done by him under said franchise, he would pay to plaintiff a like sum of money; that such an arrangement would be retroactive to July 1, 1946, and continue up to January 1, 1947, by which time defendant Brewer would be profitably established. Such arrangement was made by plaintiff under the still continuing confidence in the ability and integrity of defendant Brewer and with the understanding that defendant Charles P. Brewer was making and would continue to make a profit and would not draw out any money except as said business would warrant said total withdrawal, and in all other particulars the provisions in said franchise contained would continue in full force and effect.

Under the above modification, an indebtedness from defendant Charles P. Brewer to plaintiff of some \$1,200 to \$1,500 was forgiven, the exact amount of which is known to said defendant.

(ii) On January 1, 1947, said franchise was again in full force and effect, and during the months of January and February of 1947 there became due and owing thereunder to plaintiff from defendant Brewer the total sum of \$994.25 upon which defendant C. P. Brewer made a payment on February 6th of \$250.00, and again on March 6, 1947, he paid \$250.00, making a total of \$500.00 payment, and the balance of \$494.25 was paid March 13, 1947, but

the franchise obligations for the months of March, April, May, June and July, amounting to the sum of \$2,675.41 were not paid and demand was made therefor upon the defendant Charles P. Brewer and he refused to pay the same, and on or about June 20, 1947, at the special instance and request of defendant Charles P. Brewer and under plaintiff's continuing confidence in his sincerity, ability and integrity, plaintiff and defendant Charles P. Brewer again made a mutual modification of the terms of payment of said franchise and did compromise all sums due under said franchise and its part time modification, and agreed that for the period from July 1, 1946, to June 30, 1947, the total sum of money due, owing and unpaid by defendant Charles P. Brewer to plaintiff was \$3,359.61, and said compromise was satisfactory [6] and agreed to by the defendant Charles P. Brewer, and upon which he made a payment of \$259.61 on July 9, 1947, and, with other credits allowed, left a balance of money still due, owing and unpaid by defendant Charles P. Brewer to plaintiff of \$2,507.41, for which demand has been made, and defendant Charles P. Brewer has failed, neglected and refused to pay the same.

(iii) Said franchise agreement had never been cancelled by either party and was ratified by payments as aforesaid and was from July 1, 1947, up to and including August 1, 1947, in full force and effect and under the terms thereof defendant Charles P. Brewer owed the plaintiff for said month of July, 1947, the sum of \$478.15 for which demand has been made and which is now due, owing and unpaid.

(iv) Still having confidence in the ability and integrity of defendant Charles P. Brewer and at his special instance and request and as an aid by the plaintiff to said defendant in building up the business to the profit of both parties and because defendant Charles P. Brewer complained he could not do it alone, plaintiff and defendant Charles P. Brewer on or about January 20, 1947, at Portland, Oregon, agreed to augment said franchise agreement with additional help and compensation, and mutually and orally agreed as follows:

Plaintiff would and did send a salesman and serviceman from its main office at Oakland, California, to Eastern Oregon territory to there and then build up a mutual business, and plaintiff would pay the salaries and expenses thereof in the first instance, and any profit or loss and expense of said venture would be shared equally between plaintiff and defendant Charles P. Brewer;

That the total expense of said undertaking was \$1,921.74 of which defendant's share was \$960.87 and the immediate proceeds from said undertaking, not including the future benefits to the said business thereby established, was \$1,317.00 of which plaintiff was entitled to one-half or \$658.50, or a total amount due plaintiff from defendant under this special contract of \$1,619.37, and demand has been [7] made for said sum due, owing and unpaid and defendant Charles P. Brewer has refused to pay the same.

(b) That defendants Raymond Rightmire and Carl Duncan are both residents of and inhabitants

in the State of Oregon and were employed by plaintiff for some time prior to July, 1947, and each for himself and as a condition of employment did sign and deliver to plaintiff its agreement in writing in words, letters and figures substantially as follows, to wit:

“Because I do have a limited knowledge of the exterminating, pest control, or termite business, and do not know any formulas, processes, methods, or other trade secrets, thereof, I agree not to give out any learned information such as formulas or customs, or to go to work for any other pest control firm for a period of three (3) years after the termination of my employment with this company, in the district in which I am now working.”

(c) Defendant Rosalie Brewer is now and at all times herein mentioned was the wife of the defendant, Charles P. Brewer, and a resident of and an inhabitant in the State of Oregon and was bookkeeper for said defendant and in partial management of plaintiff's office at Portland, Oregon, and in complete management upon the absence of defendant Charles P. Brewer, and was authorized to and did sign checks of the plaintiff, together with her defendant husband, and either in whole or in part substantially and materially knew all of the matters and things herein alleged in connection with plaintiff's business and did participate in depriving plaintiff of its business, as hereinafter more fully alleged.

(d) Defendant Earl Merriott is now and at all times herein mentioned has been a resident of and an inhabitant in the State of Oregon and was employed by plaintiff on or about February 3, 1947, through the action of defendant Charles P. Brewer who, had he done as required by his agreement, would have signed defendant Merriott upon a contract similar to that of said defendants Duncan and Rightmire, but defendant Merriott knew all, or substantially all, of the matters and things herein alleged and was particularly familiar with formulas, methods, chemicals [8] and service of plaintiff, and elected to associate himself with the defendants, as hereinafter described.

IV.

Said defendants were for various periods of time prior to August 1, 1947, either in the employment or service directly or indirectly of plaintiff and thereby possessed of the knowledge of plaintiff's business, its chemicals, methods of application, all as above described, and all the patrons and customers of plaintiff and their addresses who were either under contract with or served by the plaintiff; that said employment of defendants by plaintiff terminated by voluntary act of defendants in accordance with the scheme hereinafter described, on August 1, 1947, and for some time prior thereto and during their employment, the exact time being to the plaintiff unknown, defendants and each of them with the others did combine, conspire, confederate, agree and cooperate among themselves and with each other to do the following things:

(1) to breach and refuse to perform their individual contracts and agreements or employment with this plaintiff and to aid and assist each other in such purpose and scheme;

(2) to acquire for themselves and for the benefit of each other and their joint association all the knowledge defendants could of plaintiff's business, chemicals, formulae, material and methods, as hereinabove described, together with the names and addresses of all patrons and customers or contacts of plaintiff;

(3) to serve plaintiff's customers well and thereby to build up a good will for themselves thereafter, where the customer would know only the attending defendant or defendants as the party serving said customer in the work of pest control and to thereby be able by such personal contact to later acquire this account for their own use and benefit and to the exclusion of that of the plaintiff;

(4) for themselves to take over, acquire, hold and serve permanently all the customers and patrons of plaintiff immediately upon the [9] termination of their employment which they then and there contemplated doing when they had sufficiently established their own good will with customers of plaintiff which was to be done during a period of three years immediately following the termination of their employment and to take unto either their association or to themselves all money of the plaintiff, its methods, chemicals, systems, service, patrons, business, equipment and profits and place themselves in relation to the customer in the identi-

cal position previously occupied by plaintiff, and to do for all customers of plaintiff the identical or similar service which they had performed while in the employ or association with plaintiff so that in the customers' mind there would be no distinction in the matter of service;

(5) to cause customers or patrons of plaintiff to break their contracts with plaintiff or to cease their single shot service in favor of themselves and to advise and represent to patrons that plaintiff was liquidating or going out of business or no longer serving them, and that they were taking over the business and would carry on in identically the same efficient and satisfactory manner as they had previously done and to do so quickly and effectively, thereby intending to acquire said plaintiff's business prior to the time the plaintiff would have any opportunity to reestablish its business, procure the necessary trained personnel involved in its service and the equipment necessary to serve the customers either under contract or single shot service and thereby defendants would acquire all the business of plaintiff;

(6) to ignore the territorial limits of said franchise and go into the states of Idaho or Washington and by application of plaintiff's products, methods and equipment to establish for themselves a business in said localities;

All of which conspiracy, scheme and plan said defendants are now performing and carrying into effect by their joint and several action. [10]

V.

To effect said conspiracy and scheme of self-enrichment, defendants, either jointly or severally, but always with the purpose of aiding and abetting their organization and each other, did do and accomplish the following overt acts, to wit:

(1) On July 24, 1947, and after defendant Charles B. Brewer felt himself sufficiently entrenched in the favor of the customers of said plaintiff, said defendant Charles P. Brewer did in writing and without the ninety days' notice specified in his contract, make, sign and deliver an instrument terminating his franchise as of August 1, 1947, of which the following in words, letters and figures is substantially a copy:

“July 24, 1947.

“Mr. T. C. Sibert
638 - 16th St.
Oakland 12, Calif.

“Dear Ted:

“Will you please except my resignation and the termination of my franchise as of August 1, 1947.

“I will, before August 1, take inventory of all supplies and equipment owned by me, so that we will be able to effect a cash settlement at that time. If you care to buy my equipment that will be alright with me, otherwise I'll keep it as I could maybe use it in the future.

“Please advise me as to whether you want to audit the books, or if I should have it done here by a registered C.P.A.

Respectfully yours,

CHARLES P. BREWER.”

(2) took all the chemicals and equipment previously used and continuing to use some parts thereof by delivering some and keeping the residue.

(3) Defendant Charles P. Brewer bought from a third party an automobile with plaintiff's money, taking the same in his own name and mortgaging it to a bank whereby repossession by plaintiff was prevented, which automobile he continues to use in the business of said defendants.

(4) Defendant, Rosalie Brewer, under the conspiracy and scheme [11] herein described, did make, execute and acknowledge on July 30, 1947, a certain “Certificate of Assumed Business Name” wherein the said Rosalie Brewer (she not being under the same contract or franchise with her husband) did falsely and fraudulently declare that the real and true names and post office addresses of the persons conducting, having an interest in or intending to conduct the business of pest control under the name and style of “Brewer Pest Control” located at Portland, Multnomah County, Oregon, were the following, to wit: “Rosalie Brewer, post office address 4929 Northeast 28th Avenue, Portland, Oregon,” which assumed business name defendants caused to be recorded in Book 61, Record

of Assumed Business Names of Multnomah County, Oregon, at page 212 thereof.

Subsequently, at an appropriate time, when defendants felt they were no longer in danger of any action on the part of this plaintiff, the said defendant Rosalie Brewer did on, to-wit, August 27, 1947, make, sign and acknowledge a "Certificate of Retirement" stating falsely and fraudulent that she no longer had any interest or business in "Brewer's Pest Control," and concurrently with said defendant Rosalie Brewer filing her Certificate of Retirement, the said defendant Charles P. Brewer did falsely and fraudulently file a "Certificate of Assumed Business Name" in which he declared that the person conducting, having an interest in and intending to conduct the business of pest control under the assumed business name of "Brewer's Pest Control" was "Charles P. Brewer, post office address 4929 N. E. 28th Avenue, Portland 11, Oregon";

All of the above described action being in furtherance and execution of the conspiracy and association hereinabove described, and defendant Charles P. Brewer continues to operate under said alleged assumed name, and all of said defendants have solicited, served and applied plaintiff's methods and products under the name of "Brewer's Pest Control" or similar identification of their association.

(5) That the above described action of acquiring said business [12] of plaintiff was by defendants Charles P. Brewer, Raymond Rightmire and Carl

Duncan done knowingly and intentionally, contrary to and in violation of their agreement not to go to work for any other pest control firm for a period of three years after the termination of their employment with plaintiff company in the district in which they were working, and defendants Rosalie Brewer and Earl Merriott were knowingly and intentionally aiding and abetting, under their scheme and conspiracy for self-enrichment, the said defendants Charles P. Brewer, Raymond Rightmire and Carl Duncan in the manner hereinabove alleged.

(6) That all of said defendants knowingly and intentionally aided defendant Charles P. Brewer in the violation of his franchise contract in the following particulars:

(a) In not serving the Company faithfully, diligently and in accordance with his best abilities in all respects and in not using his utmost endeavors to promote the interests of the Company;

(b) did not take all contracts for work and service to be rendered by the Agent to customers in the name of the Company;

(c) did not aid in causing the proceeds of said service to be paid to plaintiff and did not pay any sums arising from said business to plaintiff;

(d) in not purchasing all of his supplies from the plaintiff;

(e) did not use every effort in the promotion and sale of the products of plaintiff or do what-

ever was necessary or required by the plaintiff to increase the business of said plaintiff;

(f) did take from the records of the plaintiff the private information of plaintiff, including copies of the names and addresses of customers, and used it against the plaintiff and in furtherance of their own business;

(g) did not deliver up to the plaintiff on demand all of the property, cards, information, stock, merchandise, chemicals, equipment or instrumentalities used in connection with said business;

(h) while making collections, did not make himself responsible [13] for all accounts served in his territory and for the collection thereof and for all men working for or under him in said territory;

(i) by canvassing, soliciting or catering to any and all of the customers of the plaintiff which he had known because of his employment by said plaintiff;

(j) by taking to themselves rather than protecting trade secrets, formulas, methods, processes and the like and all customer lists, operation data discovered, acquired or prepared during their employment, as the sole property of the Company.

That all of said defendants, since the cessation of their employment with the plaintiff and under the conspiracy and scheme herein alleged, have done the identical or similar service for the de-

fendant Charles P. Brewer or their organization which they did and performed for this plaintiff and which service is done for their personal and associated enrichment and benefit and have taken unto themselves all of the business created by the plaintiff through its agents and employees and intended to be and previously acknowledged by said defendants as the business solely owned and served by the plaintiff.

VI.

That a full and complete accounting and statement of the obligations due, owing and unpaid to plaintiff from said defendants, individually or collectively, is as follows:

(1) From Defendant Charles P. Brewer:

(a) Balance due under the settlement as of June 30, 1947, from defendant Charles P. Brewer to plaintiff, \$3,100.00;

(b) Due, as aforesaid, on the July 1947 franchise account, \$478.15;

(c) Investment of plaintiff, which was a total investment in furniture, fixtures, equipment and tools that were on the territory at the time Charles P. Brewer took his franchise and which he received, \$1,259.63;

(d) Defendant Charles P. Brewer failed to turn in the [14] balance of the assets hereinafter mentioned and which plaintiff would prefer in kind, but which was of the reasonable sum of \$973.00;

(e) Under the modified agreement between defendant Charles P. Brewer and plaintiff herein, whereby said defendant was to pay to plaintiff the same sum of money that took from the business for himself, an accounting has disclosed that there were some twenty-one items either in his favor personally or charged to expense wherein there were no invoices or supporting data on file in said Brewer's office to show that the same were actually paid or that they were legitimate expenses of the business or otherwise deductible from the earnings of the Agent. These amounted to the sum of \$925.89 and until and unless said defendant Brewer properly accounts for the same, they are charged against his account as unauthorized withdrawals;

(f) Under the special agreement hereinbefore alleged in Paragraph III (a) (iv) on page 7 hereof, the sum of \$1,619.37 is due, owing and unpaid from said defendant Brewer to Plaintiff;

The above liabilities making a total of \$8,356.34;

(g) There is to be credited to defendant Charles P. Brewer's account the following:

Accounts receivable not collected by defendant Charles P. Brewer, as specified in said contract, but collected by the plaintiff and credited to said defendant, \$1,297.25;

Inventory turned in by defendant Charles P. Brewer of \$540.71;

Turned in by defendant Charles P. Brewer on the original investment of plaintiff in the assets, \$1,465.71;

The above credits making a total of \$3,303.67, and leaving a balance of \$5,052.67 due under contractual obligation.

(2) Damage caused by said defendants to this plaintiff by virtue of their conduct, as hereinbefore described, includes the following:

(a) When said defendants started to usurp and take over all [15] of plaintiff's contracts, plaintiff sent men into said territory to interview and hold such accounts as plaintiff could, and the action of said defendants, as herein described, damaged plaintiff in the amount of said expense, consisting of \$3,596.95.

(b) There were unexpired contracts between plaintiff and its customers which were taken over and served by the defendants, which contracts were in writing and signed for a year but which, before their unexpired period had run, were cancelled by customers because defendants were serving them, and the sum of money lost by virtue of the cancellation of said contracts because of the action of said defendants, is the sum of \$2,481.50.

(c) There were other contracts between plaintiff and its customers which were in writing and the original term thereof had expired, but which written contracts provided that the terms of said written agreement with the cus-

tomers were to continue after the expiration of the original term "until cancelled in writing by either party," and said contracts were not cancelled in writing or otherwise until the defendants themselves, by their concerted action, usurped and took over the service covered in said written agreements, and the damage occasioned by defendants to plaintiff in taking over such service represented a sum of \$775.00.

(d) When said defendants, by their concerted action, took over the business of plaintiff in Oregon and other localities, men who were trained and valuable to the plaintiff's service in California and Washington were taken away from their respective localities and the business of this plaintiff and sent to Oregon for the purpose of serving plaintiff's business here, and in this process the plaintiff lost money which constitutes an item of damage occasioned by these defendants against this plaintiff and which item of damage, if it is ascertainable, should be included herein as a claim against said defendants, and unless the same is ascertainable (and at the present time plaintiff has no means of definitely ascertaining this amount), it is alleged that this [16] certain damage, but indefinite in amount, constitutes an additional grounds for injunction and equitable relief.

(e) That the defendants, and each of them, have been actively engaged since August 1, 1947, and prior thereto, in taking away the business

and accounts, either under contract or single shot, of plaintiff, in violation of their three-year non-competitive agreement, as herein described, and plaintiff alleges that this damage has amounted to approximately the sum of \$1,500.00 per month, or a damage of a total amount of \$4,500.00 to the present date and continuing, and increasing as long as defendants are permitted to operate under said conspiracy.

VII.

(a) Plaintiff has either performed and there has occurred all conditions precedent to the bringing of this suit or defendants' conduct has made the same impossible or unnecessary.

(b) Plaintiff has set forth herein the names and activities of all parties known to it as participating in the conspiracy, and alleges that it is informed and believes that there are others connected with said defendants in this conspiracy, but whose names and addresses are not known at this time to this plaintiff.

VIII.

In addition to the sums of money due and the damages occasioned to plaintiff by defendants jointly and severally as above described, said defendants have jointly and severally caused damage to plaintiff which is difficult and impossible of ascertainment because of the nature of defendants' actions, and has caused plaintiff to expend large sums of money in the protection of its rights, and unless

restrained by action of this Court, said defendants will jointly and severally continue in said course of conduct and create further irreparable cost and damage to plaintiff; that plaintiff has no plain, adequate or speedy remedy at law, but only in this court of equity.

Wherefore, Plaintiff Prays a judgment of this Honorable Court as [17] follows:

(1) For a temporary restraining order, enjoining said defendants and all persons now unknown to plaintiff and similarly engaged with defendants, as herein described, and each of them, from continuing their unlawful and unconscionable conduct, all as above mentioned, and, upon final hearing of this cause on the merits, that said temporary restraining order be made a permanent injunction against defendants and each of them under penalty of contempt of court if defendants, or either of them, continue in said practice herein described or in conflict with their agreements;

(2) Against said defendants, and each of them, for such sums of money as the Court may find are due, under the above allegations, to plaintiff either under contract or in damages, and to pay over to plaintiff all the gains, profits and advantages derived by defendants, or either of them, from their unlawful conduct, as herein described, or such sum of damages as the Court finds proper;

(3) Requiring defendants to specifically perform said agreement in delivering up to this plaintiff all merchandise, stock, chemicals, equipment, formulas

and secret trade information used exclusively in the above described business of plaintiff and acquired at great expense by plaintiff and protected by contract from falling into the hands of unscrupulous and unlawful competitors, and that the same be impounded in court during the pendency of this action;

(4) For plaintiff's costs herein; and

(5) Such other, further or different relief as to this Honorable Court may seem just and equitable in the premises;

(6) Plaintiff demands of defendants, and each of them, that within fifteen (15) days from the service hereof, each of said defendants make the following answers separately and fully, in writing and under oath, for the purposes of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

(a) That each of the following documents pleaded in this [18] Complaint are genuine:

(i) the contract or franchise of July 1, 1946, between plaintiff and defendant Charles P. Brewer, hereto attached as "Exhibit 1";

(ii) the agreement between plaintiff and employees, as described in Paragraph III (b) on page 8 hereof;

(iii) the letter of resignation, as described in Paragraph V on page 11 hereof.

(b) That each of the following statements are true:

(i) That defendants are jointly and severally
(1) soliciting or (2) serving customers or

patrons for pest control service who were formerly (1) under contract with plaintiff for similar service or (2) who were served by plaintiff for pest control.

(ii) That upon service of customers by the defendants, or either of them, the defendants used the following notice:

“Patrons

This establishment inspected and serviced
each month for disease carrying pests

By

Brewer's Pest Control

State-Wide

4929 N. E. 28th Avenue, Portland 11, Oregon
1947 WEBster 8082”

(c) Submit a list of all patrons and customers and their addresses served by defendants, or either of them, and whom they are now serving or have served since August 1, 1947, in the matter of pest control.

Dated at Portland, Oregon, this 22nd day of October, 1947.

KENNETH C. GILLIS,
F. LEO SMITH,
ROBERT R. RANKIN,

Attorneys for Plaintiff.

[Endorsed]: Filed October 24, 1947. [19]

EXHIBIT No. 1

SALES AGENT'S AGREEMENT WITH PARAMOUNT PEST CONTROL SERVICE

This Agreement executed in duplicate at Oakland, California, this 1st day of July, 1946, by the Paramount Pest Control Service, a corporation, hereinafter called the Company, and Charles P. Brewer of Portland, Oregon, hereinafter called the Agent,

Witnesseth:

1. The Company hereby grants to the Agent, and the Agent does hereby accept the sole and exclusive franchise to represent the Company in rendering services for and selling and using the products of the Company in that certain territory described as follows, to wit: The entire State of Oregon. Any deviation shall be in writing with Franchise holders of adjoining states, a copy of which must be sent to Company.

It is understood and agreed that this franchise only covers such services and products as can be rendered, used and sold by Agent under a Group "E" Owners and Operators License issued by the State of California, and that nothing herein contained shall prevent Company from rendering, using and selling services and products of the Company in said territory which are not covered by said Group "E" Owners and Operators License, or which cannot be rendered, used or sold by Agent by reason of the limitations of said License.

It is agreed, however, that if and when Agent secures a License to render services for and to use and sell products of the Company in addition to those covered by Group "E" Owners and Operators License, that Agent shall then have the right to [20] and he is hereby granted the Exclusive Franchise under the terms and conditions of this contract for such additional services and products.

2. This Agreement shall become effective on the 1st day of July, 1946, and shall, unless sooner terminated as herein provided, continue in full force and effect for a period of ten (10) years from said date. Said agreement may be cancelled by either party at any time on ninety days' written notice to the other. At the end of said period of ten (10) years provided for herein, in the event that all of the terms and conditions of this agreement have been kept and performed, said agreement shall thereby be automatically renewed for the same period of years as originally granted for, and thereafter shall continue for successive like periods unless cancelled, as provided herein.

3. The Agent shall devote the whole of his time, attention and energies to the performance of such duties as may from time to time be assigned to him by the Company, and shall not either directly or indirectly, alone, or in partnership, be connected with or concerned in any other business or employment whatsoever during the said term of his employment, and shall serve the Company faithfully, diligently and according to his best abilities in all respects, and use his utmost endeavors to promote the interests of the Company.

4. All contracts for work and services to be rendered by Agent to customers shall be taken in the name of the Company, the original of said contract shall, upon its execution, be forwarded to the Company, the Agent retaining a Copy and the Customer being [21] furnished a copy.

5. Agent agrees to pay Company in the manner hereinafter provided for such Franchise twenty (20%) per cent of the gross business done by Agent. As compensation for his services, Agent shall retain all gross profits over said twenty per cent (20%) above mentioned.

6. From his compensation, Agent agrees to pay the following expenses of maintaining said business in said territory, namely:

- a. Wages Service
- b. Materials & Expense Service
- c. Wages Salesmen
- d. Commissions
- e. Advertising
- f. Auto Expense—Gas, Oil & Repairs
- g. Depreciation
- h. Insurance
- i. Taxes & Licenses
- j. Traveling Expense
- k. Wages Office
- l. Bad Debts
- m. Donations
- n. Gas Light & Water
- o. Legal & Accounting
- p. Miscellaneous Expense

- q. Office Expense—Stationery, Printing & Supplies
- r. Telephone & Telegraph
- s. Discounts & Allowance—Received
- t. Profit & Loss on Sales of Capital Assets
- u. Tithing
- v. Discounts & Allowance—Paid
- w. Interest Paid

together with such other expense as in the judgment of the Company should be charged against said business.

7. Company agrees that from the amount due the Company under paragraph 5, there shall be deducted an amount equal to ten per cent (10%) thereof, which shall be paid to the Christian Service Foundation, a non-profit charitable organization. Agent agrees that from the monthly net profit of said business shall be deducted an amount equal to ten per cent (10%) of said net profit, [22] which shall be paid to said Christian Service Foundation.

8. Agent shall open a bank account in the name of the Company and shall deposit therein all moneys received by him in connection with said business. Moneys shall be drawn out of said account only upon the signature of Agent and some employee of Agent, to be designated by Agent.

9. Agent shall keep books of account showing all transactions in said business. Said books shall be opened by Company Auditor and shall then be maintained to conform with the systems used by Company and as directed by said Auditor. Agent agrees

that all times the representatives of the Company shall have free access to the offices of Agent and to all books, records, materials and documents used by said Agent in connection with the business covered by this contract.

10. The Company Auditor shall audit the books of Agent immediately after the last day of each and every month during the life of this contract, and prepare a statement of the business done during the previous month by Agent, together with a profit and loss statement for said previous month. Upon the completion of said statement and presentation of a copy thereof to Agent, said Agent agrees to forthwith deliver to said Auditor a check payable to Company for the amount due Company under said statement, less ten per cent (10%) thereof; a check payable to Christian Service Foundation for the ten per cent (10%) of the amount due Company under said statement, and a check payable to Christian Service Foundation for an amount equal to ten per cent (10%) of agent's net profits, as shown by said statements. Said checks, in any event, must be delivered on or before the 10th day of the month in which they are due. It is agreed by both parties that the decision of the Auditor as to the correctness of said statement and of all items listed thereon shall be final and conclusive as [23] to both parties.

11. Agent shall be allowed deductions from gross business acquired in any one month as shown by his books for cancellations of any business, and allowance slips duly allowed. These deductions shall be

made from the gross business of the next succeeding month after the month when such cancellations or allowance slips occur.

Agent shall stand all loss for failure to make collections.

12. The Agent shall maintain an office in his territory and shall cause the name of the Company, as well as his own, to be properly listed in the local telephone directory in the classified section thereof, and shall display upon the windows of any office the name of the Company as well as his own name, as Agent. At the time of signing of this agreement, the Company agrees to furnish him with such trucks and equipment as in its judgment is necessary for his use. Thereafter Agent agrees to purchase on his own account such additional trucks and equipment as shall be necessary to handle his said business.

13. Upon the signing of this contract, Agent agrees to purchase from Company such stock, merchandise, chemicals and materials as will provide him with such quantity of each as will meet the needs of his business for the next succeeding thirty days and that he will continue to maintain such quantities of each as will meet the needs of his business for a thirty day period. Notice of his intention to purchase any of the above must be given at least thirty days in advance of the delivery date.

14. The Agent agrees to use every effort in the promotion and sale of the products and services of the Company in the above territory and do what ever shall be necessary or required by the Company to increase the business of said Company in said territory.

15. Each of the parties hereto shall be excused from the performance of the terms and conditions herein contained, and this agreement and all the terms and conditions herein contained are subject to such interference, interruption or cessation as may be caused by acts of God, strikes, lock-outs, floods, boycotts, picketing, acts of the public enemy, governmental priority regulations, laws, regulations or executive orders of the Government of the United States, or any other cause or condition over which the party has no control.

16. The Company agrees to furnish the Agent all advertising matter, contract forms, letterheads and any other printed matter which, in the opinion of the Company, is necessary in the operation of the business of the Agent, and which Agent agrees to pay for. All advertising, window displays and listings shall conform to the methods as given to him by the Company.

17. It is expressly understood and agreed by the Agent that all of the rules and regulations of the Company which are now printed and in full force and effect, or any amendments that may be made hereafter, or any subsequent rules and regulations made by the Company, shall be and they are hereby declared a part of this contract and binding upon the Agent, and the Company agrees to furnish the Agent with a copy of any rules and regulations now in force, and to immediately furnish him with any amendments or new rules and regulations that may be hereafter adopted. [25]

18. The Agent agrees to at all times keep intact all of the Communications and other material given to him by the Company as confidential information, and that in the event of the termination of this agreement he will surrender all of the same to the Company or its designated agent, and will not at or subsequent to the termination of this agreement divulge such confidential information to anyone outside of the organization.

19. Any notice to be given under the terms of this agreement by the Company to the Agent may be given by placing the same in a sealed envelope addressed to the Agent at, and said sealed envelope containing the notice so addressed, with postage thereon prepaid, shall be deposited in the United States Post Office at Oakland, California or any other place. In the event that the principal place of business of the Agent may be changed, and the Company is notified of said fact prior to the mailing of any notice under this agreement, then said notice shall be sent to the address where the principal place of business is then located. Upon such deposit being made, as aforesaid, the notice shall, for all purposes of this agreement, be complete.

20. In the event of the termination of this agreement, Agent promises and agrees to surrender and deliver to the Company, upon demand, possession of the office, all of the records, cards, information, stock, merchandise, chemicals, equipment and any and all instrumentalities connected with and used in his said business. Said demand may be made at

any time after notice of termination is received or served.

21. Should Agent own the real property and building in which his said office is located at the time of the termination of this agreement for any cause, then said Agent agrees to and does [26] hereby grant Company the right and option, for a period of ninety days after the termination of this contract, to purchase said property at the fair market value thereof.

22. In the event of the termination of this agreement the Company agrees to pay Agent, or his legal representatives, the cost of all stock, merchandise, chemicals and equipment owned by Agent and used in connection with said business, less any depreciation on same that appears on the books.

23. Neither this agreement nor any interest therein shall be assignable at the hands of said Agent, except as hereinafter provided, and in the event any assignment is made by the Agent for the benefit of creditors, or if said Agent be adjudged a bankrupt, whether voluntary or involuntary, or if a receiver be appointed in any proceedings against the Agent, this agreement and all the rights of the Agent thereunder shall immediately terminate.

24. Agent agrees to cover his employees and property with all necessary fire, theft, liability and compensation insurance with proper policies, to be approved by Company, and further agrees to take out such other insurance as Company shall deem necessary, all to be paid for by Agent, and which shall be included as an expense against his said business.

25. The Agent agrees that he will not at any time during the life of this agreement mortgage, hypothecate, pledge or seek to encumber any merchandise, personal property or equipment in his possession consigned to him by the Company.

26. Agent agrees that he will at all times conduct his business in accordance with and conform to all municipal, county, state and federal statutes, laws, ordinances, regulations and executive orders. [27]

27. It is agreed that the laws of the State of California shall govern any and all questions that at any time may arise concerning the validity, construction or interpretation of this agreement, or any provision thereof, and the parties hereto agree that should any civil action be filed upon this agreement, or for any violation thereof, that the same shall be filed in the Superior Court of the State of California, in and for the County of Alameda, which said Court is hereby given exclusive jurisdiction of any such action. Time is expressly agreed to be of the essence thereof.

28. A waiver by the Company of any branch or any term or condition of this agreement shall not be construed in any way as a waiver of a further, like, or other breach of this agreement.

29. The Company reserves the right to interview and be satisfied with and approve all persons employed by the Agent in his territory, and the Agent agrees that he will not employ any person without first securing the approval of said Company. Agent agrees to discharge any person employed unsatisfactory to Company, on demand.

30. The Agent agrees to be responsible for all accounts served in his territory, for the collection of all accounts in his territory, and for all men working for and under him in said territory.

31. The Agent further agrees that for a period of three years after the termination of this agreement, or his period of employment, he will not, directly, or indirectly, communicate or divulge to or make use of for the benefit of any person, partnership or corporation any of the trade secrets, formulas, processing methods of the Company, or the names, addresses or requirements of any of the customers of the Company, or any other information related [28] to the Company's business which he may have acquired or learned during his employment. The Agent further agrees that he will not, either as an employee, employer or otherwise, canvass, solicit or cater to any of the customers of the Company, which he may know of because of his employment by said Company.

32. The Agent further agrees that all trade secrets, formulas, methods, processes and the like, and all customers' lists, operation data, discovered, acquired or prepared during his employment, and connected with the business of the Company shall be the sole property of the Company.

33. The Agent further agrees that he will submit the necessary information for obtaining a surety bond in such proportion as the Company may require, and furnish said bond upon demand of the Company. The Company agrees to pay the premium on said bond.

34. Should the Agent die during the life of this agreement and leave a will designating a person whom he desires to have carry on the services provided for in this contract, and providing any condition or limitation upon same in said will, the Company agrees that it will enter into a contract similar in form and effect to the within contract with such person, and changed only by the conditions or limitations provided in said will, providing the new man is satisfactory to the Company.

35. The Company shall be the exclusive judge of whether the Agent is complying with all the terms and conditions of this agreement, and its decision in this matter shall be final and conclusive as to that fact.

36. This agreement shall be binding upon the heirs, executors, administrators and assigns of the parties hereto. [29]

In Witness Whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

PARAMOUNT PEST
CONTROL SERVICE,
a Corporation,

By /s/ G. H. FISHER.

/s/ CHARLES P. BREWER,
Agent. [30]

[Title of District Court and Cause.]

MOTION FOR RESTRAINING ORDER

Comes Now the plaintiff above named, appearing by its attorneys, Kenneth C. Gillis, F. Leo Smith and Robert R. Rankin, and move the above-entitled court for an order restraining said defendants from a continued operation and practice, as more fully described in the Complaint herein; and

Moves that this Court issue an Order to Show Cause, fixing a time and place for hearing, why the defendants and each of them should not be so restrained.

This motion is based on

- (1) The verified Complaint filed herein and reference to which is hereby made;
- (2) The affidavit of T. C. Sibert, President of the plaintiff corporation, and attached to this Motion;
- (3) The Rules of Civil Procedure for the District Courts of the United States; and
- (4) On statutes and authorities in interpretation thereof.

Dated at Portland, Oregon, this 22nd day of October, 1947.

KENNETH C. GILLIS,
F. LEO SMITH,
ROBERT R. RANKIN,
Attorneys for Plaintiff.

[Endorsed]: Filed October 24, 1947. [31]

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION FOR
RESTRAINING ORDER

State of California,
County of Alameda—ss.

I, T. C. Sibert, being first duly sworn, depose and say:

That I am the President of the plaintiff corporation; that I have read and verified the Complaint herein; that I know its contents and the allegations therein contained, and that the same are all true as I verily believe;

That the defendants, in the manner in said Complaint described, are doing substantial damage to the plaintiff, and three of them were under contract to refrain from doing the very things they are doing, and the other two defendants have knowledge. I verily believe, of all that has transpired and yet continue to aid and abet the other defendants in the conspiracy alleged, and do so for their joint and several enrichment and the acquiring of plaintiff's business, as more fully detailed and set forth in said complaint; that knowing the character of the defendants involved and their program and their past practice, I firmly believe that they will continue in this course of conduct to the plaintiff company's irreparable damage unless they are restrained by this court; that a temporary restraining order is requested for the purpose of protecting this busi-

ness, to last until the hearing of this case upon the merits.

Further, deponent sayeth not.

/s/ T. C. SIBERT.

Subscribed and sworn to before me this 22nd day of October, 1947.

[Seal] /s/ KENNETH C. GILLIS,

Notary Public in and for the County of Alameda,
State of California.

My Commission expires December 8, 1950.

[Endorsed]: Filed October 24, 1947. [32]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Upon reading plaintiff's verified complaint filed herein and its motion for a temporary restraining order pendente lite, together with the affidavit attached to said motion, and the Court being satisfied that there is reason for the issuance of this Order to Show Cause herein;

It is now hereby Ordered that defendants, and each of them, above named appear before this Court at its courtroom in the United States Court House at Main Street, between Sixth Avenue and Broadway, in the City of Portland, County of Multnomah, State of Oregon, on Monday, the 17th day of No-

vember, 1947, at the hour of 10 o'clock a.m. of that date, to then and there show cause, if any they have, why a preliminary injunction should not be issued in favor of the plaintiff and against the defendants, and each of them, pending the hearing of this suit on the merits, which order shall enjoin and restrain said defendants, and each of them, during the pendency of this action, together with any members of their association, their agents, officers, representatives and employees, from directly or indirectly doing the matters and things as alleged in said complaint, a copy of which is served concurrently herewith, and particularly from soliciting and serving customers of plaintiff, persuading or inducing customers to break their contracts of service with the plaintiff, and from interfering with the business of plaintiff as established in Oregon, as in said complaint described, prior to August 1, 1947, or from violating their agreements, or aiding or abetting in the violation of those agreements, to refrain from competition for a period of three (3) [33] years after the cessation of employment, and, further, from the use of any of plaintiff's methods, equipment or products, or the information gleaned from their previous service with plaintiff in the service of defendants' customers; and

It is further Ordered that a copy of this Order to Show Cause be served by the United States Marshal upon said defendants at the time of the service of the complaint herein, and that said copy of this

Order be certified to by one of the attorneys of record herein.

Done in open court at Portland, Oregon, this 24th day of October, 1947.

CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed October 24, 1947. [34]

[Title of District Court and Cause.]

ANSWER OF CHARLES P. BREWER TO
INTERROGATORIES

State of Oregon,
County of Multnomah—ss.

I, Charles P. Brewer, being first duly sworn, make the following answers to the interrogatories propounded in the above case:

Answer to Interrogatory (a)

(I) The contract of July 1, 1946, attached as Exhibit 1, is genuine but the contract was modified after the date thereof so as to provide that the net profits would be divided between the company and the agent on an equal basis.

(II) I know of no such agreement between the plaintiff and any of the defendants. I believe the defendant Raymond Rightmire signed such an

agreement with a partnership between T. C. Sibert and G. H. Fisher, doing business as Paramount Pest Control Service. The certificate of partnership was filed on March 1, 1945 in Book 41, Page 293 of the Assumed Name Business Certificates of Multnomah County, Oregon.

(III) The letter of resignation is genuine.

Answer to Interrogatory (b)

(I) I am serving customers or patrons for pest control service who were formerly served by plaintiff for pest control and some of whom were under contract with plaintiff for [35] similar service. The other defendants are employed by me and as such employees serve customers or patrons for pest control service who were served by the plaintiff for pest control and some of whom were under contract with plaintiff for similar service. The balance of the statement is untrue.

(II) The statement is true.

Answer to Interrogatory (c)

A list of the customers and patrons is annexed to this answer and marked Exhibit A.

/s/ CHARLES P. BREWER.

EXHIBIT A

Fischer Flouring Mills.....	Portland
Pacific Coast Fruit Co.....	“
Oregon Flower Growers, Ass'n.....	“
Sunshine Biscuit Co.....	“
Sav-On-Drug Co.	“
Hi-Spot Cafe.....	Camas, Wn.
Home Town Bakery.....	“ “
Crown Willamette Inn.....	“ “
Albers Milling Co.....	Portland
Hawthorne Food Mkt.....	“
Lairds Red & White.....	“
Dizzy Whiz Cafe.....	“
Hudson Duncan Cafe.....	“ & Branches
39th. & Division Cafe.....	“
Rowes Coffee Shop.....	“
Flynns Fine Food.....	“
Sellings Red & White.....	Gresham
Hickman Pharmacy.....	Vancouver, Wn.
Plaza Theatre.....	Portland
Ideal Dairy.....	Portland
Nite & Day Mkt.....	Vancouver, Wn.
Columbia Food Stores.....	Portland & Branches
Zimmerman Feed.....	Yamhill, Ore.
Cozy Cafe.....	Newberg
Pacific Meat Co.	Portland
Imlay & Sons.....	Aloha
Imlay Feed & Seed.....	Reedville
Perfection Bakery.....	Hillsboro
West Lynn Grocery.....	West Lynn, Ore.
Harolds Grocery.....	Portland
Harvest Milling Co.....	“
Grand Ave. Cafe.....	“
Dairy Co-op.....	“
Lews Mkt.....	Oregon City
Safeway Stores, Inc.	Portland & Branches
Swartz Transfer.....	Portland
Portland Provisioner.....	“
Transportation Club.....	“
Smith Grocery.....	Hillsboro
Whistlin' Pig Cafe.....	Portland

Rivieria Cafe.....	Newberg
Standard Market	Oregon City
Harold & Dans Cafe.....	Portland
House of Good Shepherd	Portland
Brookside Grocery.....	Vancouver, Wn.
Ralphs Cafe.....	Cascade Locks
Sunset Cafe.....	Hood River
Browns Farm Store.....	Vancouver, Wn.
Eds Feed & Seed	Hood River
Foodland Grocery	Vancouver, Wn.
Little Onion Cafe.....	Hood River
Hood River Cafe	"
9th. St. Super Mkt.....	The Dalles
Cascade Baking Co.....	" "
Kerr Gifford & Co.....	" "
McHales Grocery	" "
Hotel Dalles Coffee Shop.....	" "
Star Theatre.....	Goldendale, Wn.
Grows Market.....	" "
Reliance Creamery.....	" "
Adams Market	Arlington
Central Mkt.....	Heppner, Ore.
Heppner Cafe.....	"
Red & White Store.....	"
Elkhorn Cafe	"
Aikens Tavern	"
Heppner Laundry	"
Yarnell Tavern.....	Lexington
Lexington Cafe.....	"
Farm Bureau Co-op.....	Hermiston
Purity Bakery	Pendleton
Pendleton Baking.....	"
Pacific Fruit & Produce.....	La Grande
Inland Poultry & Feed.....	"
Stein Club.....	"
Portland Cafe.....	"
7 up Bottling Co.....	"
The Stockman.....	"
Stein Coffee Shop.....	"
Sacajuca Coffee Shop.....	"
Royal Cafe.....	"
McCord Grocery.....	"

Union Bakery.....	Union, Oregon
Pacific Fruit & Produce.....	Baker, Oregon
C. C. Anderson.....	“
The Provisioner.....	“
Stockmans Exchange.....	“
Stanfords Store.....	Weiser, Idaho
Washington Hotel.....	“
Idaho Candy.....	Boise, Idaho
Geiser Grand Hotel.....	Baker, Oregon
Harney Valley Bakery.....	Burns
Hudson Duncan Co.....	Bend, Oregon
Todds Bakery.....	The Dalles
Farmers Market.....	“ “
Sigmans Food Stores.....	Hermiston
Jacksons Food Market.....	Baker, Oregon
Killgores Dairy.....	Redmond
Bond St. Food Market.....	Bend
Central Ore. Co-op. Creamery.....	Redmond
American Bakery.....	Nampa, Idaho
Electric Bakery.....	“
Hound Pup Cafe.....	Cascade Locks
The Dalles Meat Market.....	The Dalles
Lauderback Market.....	White Salmon, Wn.
Pinky's Union St. Market.....	The Dalles
Bill Rivers.....	La Grande
Baker-LaGrande Groc. Co.....	“
Elks Club.....	Baker
Valley Dairy.....	“
St. Charles Hospital.....	Bend
Nampa Whse. Grocery.....	Nampa, Idaho
City Market.....	Burns, Oregon
Goldendale City Dump.....	Goldendale, Wn.
Gem State Bakery.....	Payette, Idaho
Campas Market.....	Corvallis
Miles McKay.....	Marcola, Oregon

Griggs Market.....	Klamath Falls
Cottage Bakery.....	Cottage Grove, Oregon
Cecil's Cafe.....	“ “
Burlingham-Meeker	Amity, Oregon
Tillamook-Amity Co-op.	“
Smith Baking Co.....	Salem
Pacific Fruit & Produce.....	Albany
Kelleys Feed.....	“
Smoke House.....	Glendale
Albany Feed & Seed.....	Albany
Albany Laundry.....	“
Glendale Hotel	Glendale
Burlingham-Meeker	Rickreal
Burlingham-Meeker R.F.D.	Amity
Glendale Club	Glendale
Pacific Fruit & Produce.....	Corvallis
Burlingham-Meeker	Shedd
Creech Thrift Store.....	Glendale
Henningers Market	Roseburg
Howard Jones Feed.....	Hubbard
F. W. Woolworth.....	Medford
Pacific Fruit & Produce.....	“
Aurora Whse. Inc.....	Aurora
Woodburn Feed & Seed.....	Woodburn
Barkus Feed Mill.....	Salem

State of Oregon,
County of Multnomah—ss.

I, Charles P. Brewer, being first duly sworn, depose and say that I have read over the above and foregoing answers to the interrogatories and know the contents thereof and that the answers made by me are true except that where any answers are made upon information or belief the same are true according to my best knowledge, information and belief.

/s/ CHARLES P. BREWER.

Subscribed and sworn to before me this 14th day of November, 1947.

[Seal] E. F. BERNARD,
Notary Public for Oregon.
My Commission Expires 1/12/1941.

Service of the foregoing Answer of Charles P. Brewer to Interrogatories is hereby accepted this 14th day of November, 1947.

/s ROBERT R. RANKIN,
Of attorneys for Plaintiff.

[Endorsed]: Filed November 15, 1947. [40]

[Title of District Court and Cause.]

ANSWER OF ROSALIE BREWER
TO INTERROGATORIES

State of Oregon,
County of Multnomah—ss.

I, Rosalie Brewer, being first duly sworn, make the following answers to the interrogatories propounded in the above case:

Answer to Interrogatory (a)

(I) The contract of July 1, 1948, attached as Exhibit 1 is genuine, but the contract was modified after that date to provide that the net profits would be divided on an equal basis.

(II) I never signed such an agreement, although I am informed that Ray Rightmire signed such an agreement with a partnership.

(III) The letter of resignation is genuine.

Answer to Interrogatory (b)

(I) I am not soliciting or serving customers or patrons for pest control service who were formerly under contract with plaintiff for similar service or who were served by plaintiff for pest control. I have no knowledge as to what the other defendants are doing.

(II) The statement is true.

Answer to Interrogatory (c)

(I) I have not served any customers, but I have seen [41] Exhibit A attached to the answers of Charles B. Brewer and I believe the list to be correct.

/s/ ROSALIE BREWER. [42]

State of Oregon,
County of Multnomah—ss.

I, Rosalie Brewer, being first duly sworn, depose and say that I have read over the above and foregoing answers to the interrogatories and know the contents thereof and that the answers made by me are true except that where any answers are made upon information or belief the same are true according to my best knowledge, information and belief.

/s/ ROSALIE BREWER.

Subscribed and sworn to before me this 14th day of November, 1947.

[Seal] /s/ E. F. BERNARD,

Notary Public for Oregon.

My Commission Expires: 1/12/1951.

Service of the foregoing Answer of Rosalie Brewer to Interrogatories is hereby accepted this 14 day of November, 1947.

/s/ ROBERT R. RANKIN,

Of Attorneys for Plaintiff.

[Endorsed]: Filed November 15, 1947. [43]

[Title of District Court and Cause.]

ANSWER OF EARL MERRIOTT
TO INTERROGATORIES

State of Oregon,
County of Multnomah—ss.

I, Earl Merriott, being first duly sworn, make the following answers to the interrogatories propounded in the above case:

Answer to Interrogatory (a)

(I) I never saw the contract of July 1, 1946, attached as Exhibit 1 before I read it in the complaint that was served on me in the case filed in the Circuit Court of Multnomah County, Oregon. I understand Mr. Brewer says the Exhibit 1 is a copy of the original and I have no reason to dispute that fact.

(II) I never saw any such agreement and never signed any.

(III) I never saw the letter of resignation and am not able to say whether the letter is genuine.

Answer to Interrogatory (b)

(I) I am employed by Charles P. Brewer and as such serve customers or patrons for pest control service who were formerly served by plaintiff for pest control. I formerly solicited customers who were served by plaintiff for pest control but have not done so since the 1st day of November, 1947.

(II) The answer to the statement is true.

Answer to Interrogatory (c)

I have no list of the patrons and customers served but I have checked over Exhibit A attached to the answers of Charles P. Brewer and I believe the list to be correct.

/s/ EARL MERRIOTT. [45]

State of Oregon,
County of Multnomah—ss.

I, Earl Merriott, being first duly sworn, depose and say that I have read over the above and foregoing answers to the interrogatories and know the contents thereof and that the answers made by me are true except that where any answers are made upon information or belief the same are true according to my best knowledge, information and belief.

/s/ EARL MERRIOTT.

Subscribed and sworn to before me this 14th day of November, 1947.

[Seal]

E. F. BERNARD,

Notary Public for Oregon.

My Commission Expires: 1/12/1951.

Service of the foregoing Answer of Earl Merriott to Interrogatories is hereby accepted this 14th day of November, 1947.

/s/ ROBERT R. RANKIN,

Of attorneys for Plaintiff.

[Endorsed]: Filed November 15, 1947. [46]

[Title of District Court and Cause.]

ANSWER OF RAYMOND RIGHTMIRE TO
INTERROGATORIES

State of Oregon,
County of Multnomah—ss.

I, Raymond Rightmire, being first duly sworn, make the following answers to the interrogatories propounded in the above case:

Answer to Interrogatory (a)

(I) I never saw the contract of July 1, 1946 attached as Exhibit I before I read it in the compliant that was served on me in the case filed in the Circuit Court of Multnomah County, Oregon. I understand Mr. Brewer says the Exhibit 1 is a copy of the original and I have no reason to dispute that fact.

(II) I at one time signed such an agreement but not with the plaintiff. At the time I signed the agreement I was employed by a partnership.

(III) I never saw the letter of resignation and am not able to say whether the letter is genuine.

Answer to Interrogatory (b)

(I) I am employed by Charles P. Brewer and as such serve customers or patrons for pest control service who were formerly served by plaintiff for pest control. I formerly solicited customers who were served by plaintiff for pest control but have not done so since the 1st day of November, 1947.

(II) The answer to the statement is true.

Answer to Interrogatory (c)

I have no list of the patrons and customers served but I have checked over Exhibit A attached to the answers of Charles P. Brewer and I believe the list to be correct.

/s/ RAYMOND RIGHTMIRE.

State of Oregon,
County of Multnomah—ss.

I, Raymond Rightmire, being first duly sworn, depose and say that I have read over the above and forgoing answers to the interrogatories and know the contents thereof and that the answers made by me are true except that where any answers are made upon information or belief the same are true according to my best knowledge, information and belief.

/s/ RAYMOND RIGHTMIRE.

Subscribed and sworn to before me this 14th day of November, 1947.

[Seal] E. F. BERNARD.

Notary Public for Oregon.

My Commission Expires 1-12-1951.

Service of the foregoing Answer of Raymond Rightmire to Interrogatories is hereby accepted this 14th day of November, 1947.

/s/ ROBERT R. RANKIN,
Of Attorneys for Plaintiff.

[Endorsed]: Filed November 15, 1947. [49]

[Title of District Court and Cause.]

AFFIDAVIT IN RESPONSE TO ORDER TO
SHOW CAUSE

State of Oregon,

County of Multnomah—ss.

I, Charles P. Brewer, being first duly sworn, depose and say:

I am one of the defendants in the above entitled action and make this affidavit in response to the order to show cause issued in the action as to why a preliminary injunction should not be issued in favor of the plaintiff and against the defendant.

I formerly resided in Oakland, California, and about March 1, 1946, I was employed by a partnership doing business under the name of Paramount Pest Control Service. The partners were T. C. Sibert and G. W. Fisher, and this was the same partnership which filed an assumed name business certificate on March 1, 1945, in Book 41, Page 293, of the assumed name business certificates, of Multnomah County, Oregon. My duties with the partnership were to solicit customers and service their places of business. I was at no time furnished with any formulas, processes or secrets. The partner bought poison from wholesalers which could be bought on the market by any person or business concern. I was paid a salary of \$200.00 a month by the partnership.

In April, 1946, I was sent by the partnership to take charge of the business in the state of Oregon

and was promised a salary of \$250.00 per month and expenses. I stopped at the [50] Roosevelt Hotel in Portland. H. W. Hilts, on behalf of the partnership, brought a quantity of poison and extermination supplies to my room in the Roosevelt Hotel and left them there and immediately returned to California. No place of business was furnished me and inasmuch as a guest in a hotel could only remain for six days at that time, it was necessary for me to move the business and exterminator's supplies from hotel to hotel with me. I had been promised permanent employment on a salary by the partnership and relying on such representations, I sold my home in Oakland, California, and bought a home in Portland, Oregon.

About July 1, I was informed that a corporation was about to be formed in California, that the business in Oregon was in the red, and it was necessary that "it be dumped," and that I would have to sign a contract with the corporation or my employment would be at an end. Accordingly, I signed the instrument of which Exhibit 1 attached to the plaintiff's complaint is a copy. It will be noted that the instrument does not bear the official designation of G. H. Fisher, who signed on behalf of the corporation, and it is my information that at the time the instrument was signed, the corporation had not been organized. The corporation never qualified to do business in the state of Oregon until sometime in August, 1947.

After the signing of the instrument, I devoted my best energies to building up a business but by Nov-

ember 1, I found that there could be no profit to me under the terms of the agreement. Accordingly, I drove with my wife to California and consulted with Mr. Sibert. I told him that it would be necessary for me to quit the business and he said that he wished me to stay, and he, at that time, agreed to a modification of the contract so that I would receive fifty per cent of the net profits. I returned to Portland, and because of the modification agreed upon and not otherwise, continued in my [51] efforts to build up the business.

About March 1, Mr. Hilts delivered to me a statement or purported statement of my account with the company from January 1, 1947, which was cast not on the basis that I was to receive fifty per cent of the net profits, but on the percentages set up in the written contract. I immediately told Mr. Hilts that if the agreement was not to be lived up to, I was through and he left for California, and on his return wrote me a letter saying that I was right about the modification and that I was to receive fifty per cent of the net profits.

In June, 1947, Mr. Hilts came to Portland, and asked me to borrow money to pay to the company. I told him that I could not do so and shortly Mr. Sibert called me from Seattle about borrowing money to pay to the company and I told him the same thing. Mr. Sibert and Mr. Hilts both then came to Portland and went with me to the Bank of California. They explained to Mr. Ridehalch and told Mr. Ridehalch that I was the entire owner of the business in Portland and of all the supplies,

equipment and so forth, and that the only interest they had was in some furniture, and that I was entitled to borrow on the strength of a financial statement showing me the owner. I refused to borrow any money because Mr. Sibert had told me that he would never press me for money until the business in Oregon was on a paying basis. They then told me that beginning July 1, I would have to do business on the basis of the old written agreement and not on the basis of an equal division of the net earnings. I told them that it would be impossible for me to proceed on that basis, and I sent in my letter of resignation because of the violation and breach by the plaintiff of their agreement with me as modified.

I have repeatedly requested that I be furnished an audit of my account based on an equal division of the net profits but I have never been furnished such an audit. The company [52] refused to furnish me the necessary equipment to carry on the business and it was necessary for me to purchase much of the equipment myself and out of my own funds.

I have no property in my possession belonging to the plaintiff. All property belonging to the plaintiff was in a warehouse located at 15th and N. W. Marshall Streets, Portland, Oregon, and in the office at 519 W. Park Street, Portland, Oregon. I told the warehouseman to deliver any of the property there to the plaintiff and the plaintiff has taken possession of the office equipment.

The plaintiff has in its possession equipment and supplies purchased by me and belonging to me to

the amount and value between \$1,500.00 and \$2,000.00.

After my resignation I went into the pest control business in Oregon as Sibert and Fisher had breached their agreement made with me when I was sent to Oregon and as a result of which agreement, I sold my home in California and bought one in Portland, Oregon, and after the corporation was formed, it was my understanding that this same Sibert became President of the corporation. I was putting my time, money and energy in an attempt to build the business in Oregon and when it suited the purpose of the corporation, they repudiated their agreement with me to divide the net profits on an equal basis.

I am serving many customers that were never serviced by the plaintiff and some of the customers who were formerly serviced by the plaintiff have sought my services as they were dissatisfied with the service rendered by the plaintiff. I did solicit some of the plaintiff's customers but have ceased doing so and do not intend to solicit their customers in the future.

Prior to August 1, 1947, the plaintiff was sending men as far as Boise, Idaho, to service customers. About [53] September 1, they abandoned this service and a number of the plaintiff's customers which I am servicing are in the district which the plaintiff abandoned.

It was definitely agreed between Mr. Sibert and me that the modification of the contract to the effect

that the net profits were to be divided equally between the plaintiff and me would not be for a limited period of time, but would continue for the duration of the contract.

[Seal] CHARLES P. BREWER.

Subscribed and sworn to before me this 15th day of November, 1947.

E. F. BERNARD,

Notary Public for Oregon.

My Commission Expires 1-12-1951.

Service accepted this 15th day of November, 1947.

ROBERT R. RANKIN,

Attorney for Plaintiff

[Endorsed] Filed November 15, 1947. [54]

[Title of District Court and Cause.]

AFFIDAVIT COUNTER TO
CHARLES P. BREWER'S AFFIDAVIT

State of Oregon,
County of Multnomah—ss.

I, DeGray S. Brooks, being first duly sworn, depose and say:

That I am manager of Paramount Pest Control Service, a corporation, located at Portland, Oregon, and have been such since the 15th day of August, 1947, and consequently I am familiar with the customers who have cancelled their service with the plaintiff and with the accounts previously on its books.

That I have read the answers of Charles P. Brewer to the interrogatories herein and have analyzed the list of accounts which he has submitted, as they appear on the books of the plaintiff, and from his own statement I advise the Court that he lists some one hundred and forty-two accounts.

But under his listing he makes such generalization as Safeway Stores, Inc., whereas this includes three warehouses and fifty-one stores which are not detailed in his listing, but which, through his association with the head of that department, he now serves in their entirety. He serves Hudson-Duncan, listed as three stores, whereas there are six, and Columbia Food Stores, listed as one, whereas there are nine stores served by him; so his actual acquisition of the business of Paramount is much greater than shown on his listing.

To analyze further his statement, it appears he has taken one hundred and sixty-five accounts from Paramount Pest Control Service, leaving some forty of which we have no records. This does not necessarily mean that Paramount did not have these accounts before, because I personally instructed Charles P. Brewer to look after [55] Sigman's Food Stores. The Sigman Food Stores were under the plaintiff's service in Washington and I wrote Mr. Brewer to take care of them in Oregon several times and heard nothing further from him, but they now appear on his list attached to his Answer as stores he serviced and which should have been, if he had properly served the plaintiff, upon its list and served by plaintiff.

That so far as the employees Rightmire and Duncan are concerned, while they may have signed the original agreements with the partnership, all of these contracts were sold and transferred to the corporation and were continued between the individual employee and the corporation thereafter, and the employees may never have known any change in management or obligation and continued as they had previously, but this they learned in the natural course of administration.

In further answer to Charles P. Brewer's affidavit, in response to the Order to Show Cause, he says that the customers formerly served by the plaintiff has sought his service because dissatisfied with that of the plaintiff (pages 4 and 5). He was familiar with Paramount and its service in this state during all of that period of time and if there was any dissatisfaction with plaintiff's service, it was due to Brewer's action as the franchised agent of plaintiff in this state. His statement that he does not intend to solicit plaintiff's customers in the future is because he has, through his action, practically acquired many, if not all, and at least the most substantial of plaintiff's accounts, so his promise to refrain from further solicitation is a nullity so far as the business of the plaintiff is concerned.

Attached hereto is a list of plaintiff's accounts, with their contract number, name of the business and its location, which also appear in the defendant's claim of business, marked "Exhibit A" and incorporated in this affidavit to show the extent of the defendants' acquisition of plaintiff's business.

Further, deponent sayeth not.

DeGRAY S. BROOKS.

Subscribed and sworn to before me this 17th day of November, 1947.

[Seal]

ZELDA E. MILLER,

Notary Public for Oregon.

My Commission expires June 11, 1949.

Service of the foregoing Counter affidavit by receipt of a duly certified copy thereof, as required by law, is hereby accepted in Multnomah County, Oregon, on this 17th day of November, 1947.

/s/ E. F. BERNARD,

Attorney for Defendants.

[Endorsed]: Filed November 17, 1947. [57]

[Title of District Court and Cause.]

PRELIMINARY MEMO

Until there is disclosure in more detail of the secret nature of the processes, I do not feel that I should issue an injunction. An early pre-trial and trial date can be obtained through Clerk DeMott.

Dated November 18, 1947.

CLAUDE McCOLLOCH,

Judge.

[Endorsed]: Filed November 18, 1947. [58]

[Title of District Court and Cause.]

ORDER

The above-entitled action coming on to be heard on the motion of the plaintiff for a temporary restraining order and on the order to show cause why a preliminary injunction should not be issued, the plaintiff appearing by Robert R. Rankin and F. Leo Smith, of its attorneys, and the defendants Charles P. Brewer, Rosalie Brewer, Raymond Rightmire and Earl Merriott appearing by their attorneys, Plowden Stott and E. F. Bernard,

It is Ordered by the court that the motion for a restraining order be and hereby is denied and that a preliminary injunction do not issue.

Dated this 19th day of November, 1947.

CLAUDE McCOLLOCH,
District Judge.

[Endorsed]: Filed November 19, 1947. [59]

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS CHARLES P.
BREWER, ROSALIE BREWER, RAY-
MOND RIGHTMIRE and EARL MERRIOTT

For their answer to the plaintiff's complaint the defendants Charles P. Brewer, Rosalie Brewer, Raymond Rightmire and Earl Merriott admit, deny and allege as follows:

First Defense

1. The defendants admit Paragraph numbered I of the complaint except the defendants deny that they have performed any unlawful conduct.

2. The defendants admit Subdivision (a) and (b) of Paragraph numbered II of the complaint save and except the defendants deny that the plaintiff has been engaged in the business described in the State of Oregon.

The defendants deny Subdivision (c) and (d) of Paragraph numbered II of the complaint.

3. The defendants admit that the defendant Charles P. Brewer and the plaintiff signed an agreement of which Exhibit numbered One, attached to the plaintiff's complaint, is a copy. The defendants admit that thereafter the agreement was modified to provide so that Paragraph numbered 5 of the agreement would be eliminated and that in lieu thereof the plaintiff and the defendant Charles P. Brewer would each be entitled to one-half of the net profits from the business after payment of all expenses. The defendants further admit that the defendant [60] Charles P. Brewer on or about the 6th day of February, 1947 paid the plaintiff the sum of \$250.00; and on or about the 6th day of March, 1947 the sum of \$250.00; and on or about the 13th day of March, 1947 the sum of \$494.25; and the sum of \$259.61 on or about July 9, 1947. The defendants further admit that the plaintiff agreed to send a salesman and service man from its main office at Oakland, California to eastern Oregon to build up

the business and that the plaintiff would pay the salaries and expenses thereof in the first instant, and that any profit or loss in expense in said venture would be shared equally between the plaintiff and the defendant Charles P. Brewer.

The defendants further admit that the defendant Raymond Rightmire is a resident of and an inhabitant in the State of Oregon and that the defendant Rosalie Brewer is now and at all times mentioned was the wife of the defendant Charles P. Brewer and a resident of and an inhabitant in the State of Oregon and assisted Charles P. Brewer in his business. The defendants admit that the defendant Earl Merriott is now and at all times mentioned in the complaint has been a resident of and an inhabitant in the State of Oregon and was employed by the plaintiff through the defendant Charles P. Brewer.

Save and except as herein expressly admitted, the defendants deny Paragraph numbered III of the complaint and the whole thereof.

4. The defendants deny Paragraph numbered IV of the complaint and the whole thereof.

5. The defendants deny Paragraph numbered V of the complaint and the whole thereof save and except the defendants admit that the defendant Charles P. Brewer signed the letter, a copy of which is set forth in Subdivision (1) of Paragraph V.

6. The defendants deny Paragraphs numbered VI, VII and VIII of the complaint and the whole thereof. [61]

Second Defense

About the month of November, 1946 the plaintiff and the defendant Charles P. Brewer agreed that the contract of which Exhibit One, attached to the plaintiff's complaint, is a copy should be changed and modified as of the date of the execution thereof and continuing for the full term of the contract to this effect, that Paragraph 5 of the contract should be eliminated and that in lieu thereof the plaintiff and the defendant Charles P. Brewer should each receive fifty per cent of the net profits of the operation of the business after the payment of all expenses incidental to the operation of the business. The plaintiff and the defendant Charles P. Brewer from that time on continued to operate under the agreement as modified until about the month of July, 1947 when the plaintiff notified the defendant Charles P. Brewer that it would no longer continue the performance of the contract as modified and that the defendant Charles P. Brewer would from that time on be required to pay to the plaintiff twenty per cent of the gross business done by the defendant Charles P. Brewer. For that reason and because of the plaintiff's repudiation by the plaintiff of the contract as modified, the defendant Charles P. Brewer wrote his notice of resignation as set forth in Paragraph numbered V of the complaint.

Counter-Claim

That when the employment of the defendant Charles P. Brewer was terminated, as set forth in the Second Defense of this answer, the defendant

Charles P. Brewer turned over to the plaintiff supplies and equipment belonging to him used in connection with the business under the agreement of the plaintiff that it would pay him the reasonable value thereof together with all sums which might be due to the defendant Charles P. Brewer by reason of his performance of the contract as modified. [62] That there is due and owing to the defendant Charles P. Brewer from the plaintiff the sum of \$700.00 by reason of his performance of the contract as modified and that the reasonable value of the supplies and equipment belonging to the defendant Charles P. Brewer turned over by him to the plaintiff is in the sum of \$1350.00. By reason thereof the plaintiff is indebted to the defendant Charles P. Brewer in the sum of \$2050.00.

Wherefore, the defendants pray that the plaintiff's complaint be dismissed and that they have and recover from the plaintiff their costs and disbursements. And the defendant Charles P. Brewer prays that he have the judgment of \$2050.00 against the plaintiff and for his costs and disbursements.

PLOWDEN STOTT,

E. F. BERNARD.

Service of the foregoing Answer of Defendants Charles P. Brewer, Rosalie Brewer, Raymond Rightmire and Earl Merriott is hereby acknowledged this 21 day of November, 1947.

/s/ ROBERT R. RANKIN,

Of attorneys for Plaintiff.

[Endorsed]: Filed November 24, 1947. [63]

[Title of District Court and Cause.]

REPLY TO COUNTER-CLAIM

For Reply to the Counter-claim of defendant, Charles P. Brewer, plaintiff alleges:

Denies said counter-claim and each allegation and sum therein alleged; and alleges the plaintiff has either paid or given credit in its accounting as alleged in its complaint for any and all property or sums due from plaintiff to said defendant.

Wherefore plaintiff prays for the relief as alleged in its complaint.

KENNETH C. GILLIS,
F. LEO SMITH,
/s/ ROBERT R. RANKIN.

United States of America,
District of Oregon—ss.

Due service of the foregoing reply is hereby admitted in Portland, Oregon, this 24th day of November, 1947.

/s/ E. F. BERNARD,
Of Attorneys for Defendants.

[Endorsed]: Filed November 24, 1947. [64]

In the District Court of the United States
for the District of Oregon

Civil No. 3936

PARAMOUNT PEST CONTROL SERVICE, a
corporation,

Plaintiff,

vs.

CHARLES P. BREWER, et al.,

Defendants.

MEMORANDUM OPINION

There are equities on both sides in this case, but it seems to me the controlling factor is the time element. If that question were presented singly, I would not think I should enjoin defendant generally from re-engaging in the pest control business; but, if this were August 1947, I might feel that defendant should be restrained from doing business with plaintiff's former customers, as customers' lists are protected by the law.

Considerable time has gone by and the interests of the 140 odd third parties who have continued service with the defendant have to be kept in mind. So an injunction will be denied.

As to damages, I may need to hear the parties further, if they are not able to adjust their differences.

Dated January 30, 1948.

CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed January 30, 1948. [65]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Be It Remembered that the above-entitled action came on regularly for trial, the plaintiff appearing by its officers and Robert R. Rankin, F. Leo Smith, and Kenneth C. Gillis, its attorneys, and the defendants Charles P. Brewer, Rosalie Brewer, Raymond Rightmire, and Earl Merriott (hereinafter referred to as the defendants) appearing in person and by Plowden Stott and E. F. Bernard, their attorneys. And the court having heard and considered the evidence and the arguments of counsel and having considered the matter and being now fully advised makes the following

FINDINGS OF FACT

I.

During the month of November, 1946 the plaintiff and the defendant Charles P. Brewer mutually agreed that Paragraph No. 5 of the Franchise Agreement between them—of which Exhibit 1 attached to the Complaint is a copy— [66] should be altered and modified and it was at that time agreed that instead of the agent paying the company twenty per cent (20%) of the gross business done by the agent, the net profits of the business beginning as of the 1st day of July, 1946 and continuing throughout the term of the Franchise Agreement should be divided between the plaintiff and the defendant Charles P. Brewer on a 50-50 basis.

II.

The defendant Charles P. Brewer continued the business under the agreement as modified and about the 30th day of June, 1947 the plaintiff in violation of its agreement repudiated the contract as modified and notified the defendant Charles P. Brewer that he would thereafter be required to pay the plaintiff twenty per cent (20%) of the gross business done by him.

III.

Because of the repudiation by the plaintiff of the contract as modified, the defendant Charles P. Brewer sent in his resignation as agent to be effective August 1, 1947.

IV.

Since the 1st day of August, 1947, the defendant Charles P. Brewer has engaged in the pest control business and has solicited some of the customers of the plaintiff and has been servicing upwards of one hundred customers of the plaintiff. The issuance of an injunction would deprive such persons of uninterrupted pest control service. The defendants Raymond Rightmire and Earl Merriott have been employed by the defendant Charles P. Brewer in his pest control business. [67]

V.

The plaintiff did not disclose to the defendant Charles P. Brewer or to any of the other defendants any receipts, formulae, or secret processes and *at* the defendant Charles P. Brewer has not used in his business any receipts, formulae or processes of the plaintiff.

VI.

~~The franchise referred to in the plaintiff's complaint, of which Exhibit 1 is a copy, is not fair and reasonable.~~

From the foregoing Findings of Fact the court makes the following

CONCLUSIONS OF LAW

Damages & costs to neither party

I.

~~The plaintiff is not entitled to an injunction against the defendants.~~

II.

~~A judgment should be entered against
for the sum of \$.....~~

Dated this 14th day of February, 1948.

CLAUDE McCOLLOCH,

United States District Judge.

Service of the foregoing Findings of Fact and Conclusions of Law is accepted this 12th day of February, 1948.

R. R. RANKIN,

By G. E. BIRNIE,

Of attorneys for Plaintiff.

[Endorsed]: Filed February 14, 1948. [68]

In the District Court of the United States
for the District of Oregon

No. Civ. 3936

PARAMOUNT PEST CONTROL SERVICE, a
corporation,

Plaintiff,

vs.

CHARLES P. BREWER, et al,

Defendants.

JUDGMENT

Be It Remembered that the above-entitled cause came on regularly for trial, the plaintiff appearing by its officers and Robert R. Rankin, F. Leo Smith, and Kenneth C. Gillis, its attorneys, and the defendants Charles P. Brewer, Rosalie Brewer, Raymond Rightmire and Earl Merriott appearing in person and by Plowden Stott and E. F. Bernard, their attorneys. And the court having heretofore signed Findings of Fact and Conclusions of Law, it is

Ordered, Adjudged and Decreed that an injunction against the defendants be and hereby is denied.

It Is Further Ordered, Adjudged and Decreed that the Complaint be dismissed without costs.

Dated this 14th day of February, 1948.

CLAUDE McCOLLOCH,

United States District Judge.

[Endorsed]: Filed February 14, 1948.

Entered in Docket February 14, 1948. [69]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Paramount Pest Control Service, a corporation, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit, from the final judgment entered in this action on February 14, 1948, and the whole thereof.

Dated this 12th day of March, 1948.

KENNETH C. GILLIS,

ROBERT R. RANKIN,

Attorneys for Appellant, Paramount Pest Control Service, a Corporation.

[Endorsed]: Filed March 12, 1948. [70]

[Title of District Court and Cause.]

POINTS ON WHICH APPELLANT INTENDS TO RELY.

Appellant cites the following points on which it intends to rely for reversal of the judgment of the District Court of the United States for the District of Oregon, Honorable Claude McColloch, Judge, and claims said trial court Failed To:—

1. Find the appellant was engaged in Oregon in the business described in its Complaint and denied in the Answer.

Supporting Record: Complaint; Answer; Testi-

mony of T. C. Sibert, E. W. Bushing, C. Wendell Fisher, DeGray Brooks; and Exhibits.

2. Find all respondents had made and performed an unlawful conspiracy to (a) breach the valid written and subsisting contracts between appellant and respondents Charles P. Brewer, Raymond Rightmire and customers of appellant and (b) to deprive appellant of its established business in Oregon.

Supporting Record: Pleadings; Transcript of Testimony; exhibits and Respondents' Answers to Interrogatories.

3. Enjoin, generally, respondents and their representatives from continuing said conspiracy, including the interference with appellant's customers whether under contract or not; Specifically Enjoining Charles P. Brewer from violating his contract in connection with appellant's business and preventing him for a period of three years from August 1, 1947, from soliciting or serving appellant's customers; Specifically Enjoining respondent Raymond Rightmire for said period from working for any other pest control firm but appellant, and Issue both a temporary and permanent injunction in the Court's orders of November 18, 1947 and February 14, 1948.

Supporting Record: Pleadings, Answers to Interrogatories, Transcript of Testimony, Exhibits, Court's Memoranda of November 18, 1947 and January 30, 1948.

4. Find there was undue and unpaid to appellant the following sums of money and entering judgment therefor, to wit:

(a) Against respondent Charles P. Brewer, on agreements to pay for \$6,155.84.

Supporting Record: Exhibits 36, 39, 40, 40(a), 50, 51, 51(a) and testimony of Harold Hiltz, Pleadings and Testimony.

(b) Against all respondents, jointly and severally, for damages, \$6,796.95.

Supporting Record: Exhibits 53, 54, 55; Pleadings and Testimony.

5. Enter judgment for costs in favor of appellant.

Supporting Record: Entire Record.

Dated this 16th day of March, 1948.

/s/ KENNETH C. GILLIS,

/s/ ROBERT R. RANKIN,

Attorneys for Appellant.

Service of the within Points on which Appellant intends to rely, by receipt of a duly certified copy thereof, is hereby accepted at Portland, Oregon, this 16th day of March, 1948.

/s/ E. F. BERNARD,

of Attorneys for Appellees.

[Endorsed]: Filed March 17, 1948. [72]

[Title of District Court and Cause.]

ORDER DIRECTING TRANSMITTAL OF
ORIGINAL EXHIBITS

This matter came on for hearing on motion of the plaintiff for an order directing that the original exhibits be sent to the appellate court in lieu of copies; and

It appearing to the Court that a Notice of Appeal and Bond has been filed herein and the Court being of the opinion that the Appellate Court shall have the original exhibits for inspection on such appeal;

It is hereby Ordered that all the original exhibits offered or received in evidence in this court and the deposition of Chas. P. Brewer (McC) be sent to the Circuit Court of Appeals for the Ninth Circuit, in lieu of copies thereof, and that the sending of said originals shall in no way be construed to indicate which of said exhibits shall or shall not be printed in the Transcript of Record on appeal.

Dated this 16th day of March, 1948.

CLAUDE McCOLLOCH,
Judge.

OK E F Bernard.

[Endorsed]: Filed March 17, 1948. [73]

82

Feed

ly - 77

INDIVIDUAL

TO THE BANK OF CALIFORNIA, N. A., PORTLAND, OREGON

EXHIBIT 77
3936

Married ☒
or
Single

NAME Charles P. Brewer

BUSINESS Paramount Pest Control Service, 519 N.W. Park Ave. Portland, Ore.

For the purpose of procuring credit from time to time with you for my negotiable paper or otherwise, I furnish the following as a true and accurate statement of my financial condition on May 31, 1947, which may hereafter be considered as representing a true statement of my financial condition unless written notice of change is given you.

ASSETS		LIABILITIES	
Cash on Hand	\$ 75.10	Notes Payable:	-0-
Cash in Bank of California	75.00	To Bank of California	-0-
Cash in First Nat Bank	75.00	To Other Banks	-0-
Total Cash	150.10	For Merchandise	-0-
Notes Receivable and Trade Acceptances (Good-Not Overdue)	-0-	To Relatives and Friends	-0-
Accounts Receivable (Good-Not Overdue)	3 624.56	To Others	-0-
Salable Merchandise (how valued)	756.84	Accounts Payable:	-0-
Raw Material (how valued)	-0-	For Merchandise	-0-
Cash Value of Life Insurance	-0-	To Relatives and Friends	-0-
		To Others	Paramount Pest Cont. 2 759.63
Total Current Assets	4 531.50	Trade Acceptances	-0-
Real Estate and Buildings (as per Schedule on Back)	5 250.00	Taxes Unpaid	159.42
Machinery and Tools	1 085.77	Borrowed on Life Insurance	-0-
Automobiles and Trucks	1 836.00	Total Current Liabilities	2 919.05
Furniture and Fixtures	735.20	Mortgages or Liens on Real Estate	612.10
Investments in Stocks and Bonds (as per Schedule on Back)	-0-	Chattel Mortgages or Contracts (Covering When Due)	-0-
Notes, Trade Acceptances and Accounts Receivable (Past Due)	-0-	Other Liabilities (itemize below)	-0-
Other Assets (itemize below)	-0-	Depreciation	734.03
Personal Furniture	2 100.00	Due to Employees	5.00
Total	15 536.47	Total Liabilities	6 870.78
		NET WORTH	8 667.69
		Total	15, 538.47

CONTINGENT LIABILITIES

Notes Endorsed for Other Parties None

Notes and Accounts Receivable, Discounted or Sold and Not Included in Assets Enumerated Above None

Other Contingent Liabilities None

Specify any of above Assets pledged as collateral and the Liabilities for which they are security None

PROFIT AND LOSS ACCOUNT

Business Results for year ending 6/1/46 to 5/31/47	Gross Sales	\$33,394.30
Total Expenses for the Year	Gross Profits on Sales	10,015.14
Bad Debts charged off	Depreciation on Equipment	-0-
Depreciation charged off	Depreciation on Furniture	-0-
Net Profit	Net Profit	-0-

OVER - CONTINUED ON REVERSE PAGE

SIGN HERE Charles J. Crews
DATE June 24 1982

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF RECORD

Appellant designates the following matters to be contained in the "Transcript of Record":—

Pleadings: Complaint, Order to Show Cause, Answers of Charles P. Brewer, Rosalie Brewer, Earl Merriott and Raymond Rightmire to Interrogatories, all dated November 15, 1947, Court's memorandum of November 18, 1947, Court's Order of November 19, 1947, Answer of defendants, Reply, Memorandum Opinion of January 30, 1948, Findings of Fact, Conclusions of Law, Judgment, Notice of Appeal, Designation of Record, Statement of Appellant's Points, Order transmitting original exhibits.

Evidence: Transcript of Testimony, pages 1 to 409, incl. in question and answer form, deposition of Farries Flanagan, excluding exhibits, deposition of Charles P. Brewer taken January 7, 1948, Exhibits 3, 5, (20), 7, 10, 11, 15, 28, 29, 31, 33, 35, 36, 38, 39, 40, 40(b), 40(c), 46, 47, 48, 49, 50, 51, 51(a), 53, 54, 55 (omitting Form 7 of contracts because of duplication with Exhibit 11), 56, 57 to 60, incl., 60(a), 61, 61(a), 61(b), 62 (including title of case and Par. V, Sections (1) and (5) to end of paragraph, omitting the residue).

ROBERT R. RANKIN,

Of Attorneys for Plaintiff-
Appellant.

[Endorsed]: Filed March 17, 1948. [76]

[Title of District Court and Cause.]

APPELLEE'S DESIGNATION OF ADDI-
TIONAL PORTIONS OF THE RECORD

Appellees designate the following matters to be
contained in the Transcript of Record:

Affidavit of Charles P. Brewer in Response to
Order to Show Cause;

Pre-Trial Order;

Defendants' Exhibit No. 77.

/s/ E. F. BERNARD,

Of Attorneys for Defendants-
Appellees.

PLOWDEN STOTT,
COLLIER & BERNARD,
WM. K. SHEPARD,

Attorneys for Defendants-
Appellees.

Service of the foregoing Appellee's Designation
of Additional Portions of the Record is acknowl-
edged this 26th day of March, 1948.

R. R. RANKIN,

By G. E. BIRNIE,

Of Attorneys for Plaintiff.

[Endorsed]: Filed March 26, 1948. [77]

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF
ADDITIONAL RECORD

Appellant designates the following matters to be contained in the Transcript of Record:

Affidavit of T. C. Sibert, October 22, 1947, supporting motion for restraining order; affidavit of deGray S. Brooks answering affidavit of Charles P. Brewer, dated November 17, 1947.

(Note: No pretrial order was ever signed by the Court.)

Dated this 26th day of March, 1948.

/s/ ROBERT R. RANKIN,
Of Attorneys for Plaintiff-
Appellant.

Service of the foregoing "Appellant's Designation of Additional Record" by receipt of a duly certified copy thereof, is hereby accepted at Portland, Oregon, this 26th day of March, 1948.

E. F. BERNARD M.E.S.
Of Attorneys for Defendants-
Appellees.

[Endorsed]: Filed March 26, 1948. [78]

[Title of District Court and Cause.]

DOCKET ENTRIES

1947

Oct. 24—Filed Complaint.

Oct. 24—Issue summons—to Marshal.

Oct. 24—Filed motion for restraining order.

Oct. 24—Filed & entered order to show cause on
Nov. 17, 1947—10 a.m. why preliminary
injunction should not issue. McC.

Oct. 30—Filed summons with Marshal's return.

Nov. 15—Filed answer of Charles P. Brewer to in-
terrogatories.

Nov. 15—Filed answer of Rosalie Brewer to inter-
rogatories.

Nov. 15—Filed answer of Earl Merriott to interrog-
atories.

Nov. 15—Filed answer of Raymond Rightmire to in-
terrogatories.

Nov. 15—Filed affidavit of Charles P. Brewer re
show cause order.

Nov. 17—Filed Return of service of writ.

Nov. 17—Filed affidavit counter to Charles P. Brew-
ers affidavit.

Nov. 17—Record of hearing on order to show cause
why preliminary injunction should not
issue—argued & order taking under ad-
visement & entered order allowing deft. to
Nov. 24 to answer. McC.

Nov. 18—Filed preliminary memo.

1947

- Nov. 19—Filed & entered order denying motion for restraining order and preliminary injunction. McC. Notices.
- Nov. 19—Entered order setting for pre-trial conference Nov. 24, 1947. McC. Notices.
- Nov. 24—Filed Answer of defts. C. P. & Rosalie Brewer—R. Rightmire & E. Merriott.
- Nov. 24—Record of pre-trial conference.
- Nov. 26—Entered order setting for further pre-trial conference on Dec. 26, 1947. McC.
- Nov. 24—Filed reply to counterclaim.
- Nov. 29—Entered order setting for trial on Jan. 20, 1948—10 a.m. Notices. McC.
- Dec. 26—Record of pre-trial hearing. McC.

1948

- Jan. 6—Issued subpoena & 15 copies to Atty. G. E. Bernie.
- Jan. 6—Filed Notice to take Deposition of deft. Chas. P. Brewer.
- Jan. 7—Filed notice of deft. to produce.
- Jan. 7—Pre-trial order submitted to J. McC.
- Jan. 14—Filed motion of defts. for inspection of documents.
- Jan. 14—Filed Transcript of Proceedings Dec. 26, 1947.
- Jan. 14—Filed Deposition of Charles P. Brewer.
- Jan. 14—Issued subpoena & 1 copy to Atty. Bernie.
- Jan. 14—Filed Stipulation for deposition of Harry Flannagan.
- Jan. 15—Filed answer to motion for inspection.

1948

- Jan. 15—Filed & entered order denying motion for inspection. McC.
- Jan. 19—Filed Deposition of Farries Flanagan.
- Jan. 20—Entered order that Kenneth C. Gillis be permitted to appear specially in this case. record of trial before court. McC.
- Jan. 21—Record of trial before court resumed & cot'd to Jan. 23, 1948—10 a.m. McC.
- Jan. 23—Record of trial before court resumed & order dismissing without prejudice as to deft. Carl Duncan on court's own motion. McC.
- Jan. 24—Record of further trial before court—argument—& order taking under advisement. McC. [79]
- Jan. 30—Filed Memorandum Opinion. McC. Copies to attys.
- Feb. 11—Lodged proposed Findings of ptff.
- Feb. 14—Filed & entered Findings of Fact & Conclusions of Law. McC.
- Feb. 14—Filed & entered Judgment, denying injunction & dismissing without cost. McC.
- Mar. 12—Filed notice of appeal by plntf.
- Mar. 12—Filed bond on appeal.
- Mar. 17—Filed designation of contents of record.
- Mar. 17—Filed points on which appellant will rely.
- Mar. 17—Filed Vol. 1 & 2 transcript of proceedings, Jan. 20, 21, and 23, 1948, in duplicate.
- Mar. 17—Filed motion for order directing transmittal of original exhibits.

1948

Mar. 17—Filed and entered order directing transmittal of original exhibits McC.

Mar. 22—Filed Transcript of Proceedings Jan. 20, 21, 23, 1948.

Mar. 25—Copies of notice of appeal to attorneys.

Mar. 26—Filed appellee's designation of additional portions of record.

Mar. 26—Filed appellant's designation of additional record.

United States of America,
District of Oregon—ss.

CERTIFICATE OF CLERK

I, Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 81 inclusive constitute the transcript of record on appeal from a judgment of said Court in a cause therein numbered Civil 3936, in which Paramount Pest Control Service, a corporation, is Plaintiff and Appellant, and Charles P. Brewer et al, are defendants and Appellees; that the said transcript of contests has been prepared by me in accordance with the designations of contents of the record on appeal filed by the appellant and appellees, and in accordance with the rules of this court; that I have compared the foregoing transcript with the original record thereof and that it is a full, true and correct transcript of the record and proceedings had in said court in said cause, in accordance with

the said designations as the same appear of record and on file in my office and in my custody.

I further certify that I have enclosed under separate cover a duplicate transcript of the testimony taken and filed in this office in this cause, of proceedings on January 20, 21, 23, 1948, together with exhibits Nos. 3, 5-20, 7, 10, 11, 15, 28, 29, 31, 33, 35, 36, 38, 39, 40, 40-b, 40-c, 46, 47, 48, 49, 50, 51, 51-a, 53, 54, 55 (omitting form 7 of contracts because of duplication with exhibit 11), 56, 57, 58, 59, 60, 60-a, 61, 61-a, 62, filed in this office.

I further certify that the cost of comparing and certifying the within transcript is \$65.30 and the cost of filing the notice of appeal is \$5.00, making a total of \$70.30, and that the same has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said Court in Portland, in said District, this 6th day of April, 1948.

[Seal]

LOWELL MUNDORFF,

Clerk,

By /s/ F. L. BUCK,

Chief Deputy. [81]

In the District Court of the United States
for the District of Oregon

Civil No. 3936

PARAMOUNT PEST CONTROL SERVICE,
a corporation,

Plaintiff,

vs.

CHARLES P. BREWER, et al.,

Defendants.

Portland, Oregon

Tuesday, January 20, 1948, 10:00 o'Clock A.M.

Before: Honorable Claude McColloch,
Judge.

Appearances:

Mr. R. R. Rankin and Mr. Leo Smith, Attorneys
for Plaintiff; Mr. Kenneth C. Gillis (Oakland, Cali-
fornia), of Counsel for Plaintiff.

Mr. Earl A. Bernard and Mr. Plowden Stott, At-
torneys for Defendants.

Court Reporter: Ira G. Holcomb. [1]

PROCEEDINGS OF TRIAL

Mr. Rankin: We are ready to proceed on behalf
of the plaintiff, your Honor.

Mr. Bernard: The defendants are ready, your
Honor.

The Court: Proceed. Call a witness.

Mr. Rankin: May I respectfully suggest to the
Court that an opening statement would be of as-
sistance, in order that you may have the matter in
mind.

The Court: Yes. I have heard it discussed two or three times.

Mr. Rankin: You do not care for an opening statement, then?

The Court: Go ahead, if you want to make it.

Mr. Rankin: The suit, your Honor, is against, primarily, Charles P. Brewer, based upon the language in the franchise, which is admitted, that he agreed not to, either as an employee, employer or otherwise, canvass, solicit or cater to any of the customers of the company which he may have known of because of his employment by the company, for a period of three years after the employment ceased.

It is against three employees of the company, Duncan, Rightmire and Merriott. They are, in turn, divided into different classifications. Rightmire is one who signed a statement to the effect that he would not work for any other pest control firm for a period of three years after the termination of any employment with this company. [2*]

Duncan has never been served. We have tried diligently to make service upon him and, so far as we know, he has never been in the jurisdiction since this action was brought.

Merriott is a man who was hired by Mr. Brewer. Under Mr. Brewer's sales agency agreement, he was presumed to sign these men on contracts similar to that which Duncan and Rightmire signed, but Mr. Brewer, for purposes of his own, did not so sign Mr. Rightmire.

* Page numbering appearing at top of page of Reporter's certified Transcript of Record.

Rosalie Brewer is the wife of the defendant Charles P. Brewer. She never was in the employ of Paramount Pest Control Service but aided and assisted her husband when he was their agent here under the franchise agreement, and did also aid and assist her husband after the termination of this agreement.

Both Merriott and Rosalie Brewer are charged as co-conspirators with the others because they knowingly and willfully entered into a conspiracy to break these contracts and aid and abet others in the violation of their agreements—knowingly, because we will show in this case that these parties did flagrantly—and I mean by “flagrantly,” upon their own volition—terminate their agreements and association with Paramount Pest Control Service as of August 1, 1947.

Within a week thereafter a suit was brought in the State court by the plaintiff to enjoin them from that practice. The case was dismissed on the ground that there had not been a qualification of this foreign corporation in Oregon so that it had the benefits of the courts. The merits of the case were not at that time gone into. Subsequently that qualification for entrance into this state was complied with, and then this suit was brought in this court charging these parties, all of them, with conspiracy, and particularly from that complaint in the State court, all of these matters concerning these contracts were known to the defendants, therefore, who are the same as the defendants herein and who continued thereafter, until this complaint was brought, and

afterwards, to violate that contract and to aid and abet each other in that violation.

When it comes to the damage part of the case, it is our position that, equity having taken jurisdiction of this case for the purpose of an injunction, damages are likewise recoverable even in equity, and the gross amount of damages that are alleged in the complaint in the various items amount to \$15,175. There will be much more to be said on the item of damages as we progress in the trial of the case.

The testimony, your Honor, will be rather long and detailed because it involves, first, the history of the company. The defendants claim that we are not doing the business in Oregon that we say we are doing, and the only way to do that, as I see it, is to show what business we did do and then show what we are authorized to do, and then show what we did in Oregon, and to show this in some detail as to the composition of poisons and so forth. In fact, for my own convenience, I have divided [4] the services of this company in this insecticide control into three phases and I hope they will be of as much benefit to the Court as they have been to me.

First is the detailed study of the poisons. That is necessary here because the defendants say that these are not unusual, that you can go on the common market and buy them. We distinctly remember this Court's statement that until something more definite is shown concerning these formulas, no temporary injunction would be granted.

These poisons are divided into two classes, one of which is common—common because the laws of Cali-

fornia under which these people operate—and which the evidence will show is the most severe state in the Union on regulations—require that all poisons be registered and, so, these are registered, even though common poisons.

These poisons are all put out under the brand and label of Paramount Pest Control Service. There is a lethal quality in practically all of them—there may be one exception. The composition of them is unique in that the evidence will show that if you use A, B, C and D and mix them in that order you get one result, whereas if you mix, say, A, C, D, B, you would get a different result.

Next, after we get through with poisons, there is the study of the insects to which the poison is applicable, because some of these poisons penetrate the reproductive glands; others [5] kill anything that comes in contact only; so it requires, the evidence will show, a knowledge of the bug itself or the pest itself, a knowledge of its habits and so on.

Then the third classification is that of the application, that is, to bring these two together, the poison and the pest. That is done by a long study of what is the most effective method of accomplishing this purpose what they will take and what they won't take. Some are sweet-loving insects and you have to have a basis of sugar or something of that nature. Others have different qualities, but I shall not go into the subject further than to state to the Court that this is not just an unusual or ordinary situation.

For example, they make a rat poison. You can buy rat poison on the common market, but we will endeavor to show, and I think the evidence will show to the Court, that this rat poison has a different quality.

Then this case involves an accounting, in order to show these items of damage. I will say to the Court that I have listed, on a little separate memorandum which is not an exhibit in the case, a summary of all of the allegations of damage we are alleging in the complaint, how much they amount to and what exhibits are offered in evidence to prove those. This I will give to the Court and to counsel simply as a convenience. It is not in evidence in the case but it may be used simply as a convenience to follow through. [6]

The practice of this, your Honor, is to bring about a determination of whether these parties are entitled to continue their practices, if not enjoined and, if there is any right to compensation in a monetary form, to recover.

A word about the parties so that the Court may know about whom we are talking at every stage of the case, from the very inception. The plaintiff is the Paramount Pest Control Service. It is a California corporation. It was incorporated in July, 1947.

Prior to that time, for several years, the Paramount Pest Control Service was a partnership consisting of T. C. Sibert. Its Vice-President is Mr. Glenn Fisher. Its Secretary-Treasurer is the accountant in the firm, Mr. Harold Hilts.

The principal defendant is Mr. Charles P. Brewer. Mr. Brewer was at one time a very close and intimate friend of the Siberts. They had known each other for some time. Mr. Brewer came to Mr. Sibert and asked if there was not a place for him in this Paramount Pest Control Service. He said he was interested in coming to the Northwest.

It so happens that very shortly after that, and before Mr. Brewer's training—and, by the way, there is very diligent training given these employees, because they are dealing with a lethal quantity and quality all the time.

Before that training was completed entirely, this opening occurred here and he came up, first under the partnership [7] and then later under the corporation. In a word, the evidence will show that there was every effort made by the plaintiff to aid and facilitate Mr. Brewer in the acquiring or maintenance and increasing of the business in this state.

Rosalie Brewer, his wife, as I previously stated, not an employee of the company, assisted her husband. She was brought up here in May, 1947, and, under the direction of the Secretary-Treasurer of the corporation, put in charge of the books here for her husband so that she could know the system that would be approved by the principal, the Paramount Pest Control Service. She was office manager, signed checks of the Brewer Pest Control Service for her husband and aided and assisted him at all times, either before the breach, when he was under the agency agreement or after the breach when he went in for himself. In fact, we have reason to be-

lieve, I think the evidence will show, that she was probably the primary mover in this separation.

The next is Carl Duncan, whom I will not dwell with except to say that we believe that he is or was a very trusted employee and a very efficient one. We have not been able to get service upon him but I do not understand that militates against showing that he is or was a member of the conspiracy.

The next is Raymond Rightmire. He is a very good pest control man and had been trained in a manner that will be more accurately described later by the Paramount Pest Control Service. He saw fit to throw in his lot with Charles P. Brewer. [8]

Earl Merriott was also an employee of Brewer. He was, in fact, never signed up on any contract.

Now, a word about the pest control business. Both of these parties are engaged in pest control. That will be clearly shown and it is not denied; it is admitted here. But there is a vast difference in the operation of these two businesses.

In the first place, taking the time element, the evidence will show that the plaintiff, or those who comprise its corporation organization now, have been engaged in the business for ten years. There were times when they devoted as high as eighteen hours a day to the business, but they were not experts and they had to learn by the practical method. They devoted a great deal of their money. They had to have jobs in which they earned their living, and then their pest control work was done nights after they had finished their regular jobs from which they could acquire funds to carry on, and as

time went on, with even greater expenditures of money, they created this business. On the other hand, the defendant, the evidence will show, has not even yet had a year's experience in pest control, while the plaintiff has hired entomologists, graduates of college, who have gone through the details of knowing all about bugs, knowing also about poisons. What Mr. Brewer and his associates have gotten has been primarily from the pest control training service conducted by plaintiff and, to a minor degree, from their own research and practical service in the field. [9]

So far as knowledge of insects is concerned, plaintiff, as I say, has these entomologists, while they have no employed entomologists in their concern. They had, from time to time, before this breach occurred, written to the main office as to problems relating to the classification of bugs and so on, but where they write now we don't know. I think it will be of assistance to the Court if I recite the events chronologically.

In January Mr. Brewer made his application. In February he went to work, in training. He ceased that training April 6th and came to Oregon, his training being less than required because of the necessity of having someone in the District of Oregon.

He worked under the partnership from April 6th to July 1, 1946, and in July they signed a contract, when the corporation was not yet formed, which contract was ratified after the corporation was formed.

That franchise—it is a contract, called a sales agent's agreement, July 1, 1946. I think we will find ourselves, for the sake of brevity, repeatedly calling that a franchise, because that is the name that the parties applied to it.

That franchise, however, went into effect and was lived up to until September 12, 1946. There is a dispute between the parties here, Mr. Brewer saying that it continued until November, about Thanksgiving in November. I think the evidence [10] will show the Court that it continued up to September 12, 1946. Mr. Brewer stated that he could not do as if he had a different arrangement, not under the whole contract but only that one part, that of claimants.

I think if the Court will bear with me for a little detail, it will help keep this evidence very much clearer in mind. Section 5 of the franchise agreement provides the agent shall take 80 per cent of the gross and the Paramount Pest Control 20 per cent. Out of the 80 per cent the agent pays the expenses of his operation. That is the franchise, as we shall term it, from time to time.

The experience of the Paramount Pest Control Service shows that it takes about 60 per cent to operate this business, depending on the efficiency of the operator, so we figure that takes about 60 per cent out of the 80 per cent, leaving 20 per cent to the agent and 20 per cent to the company.

After Mr. Brewer's protest of September 12, 1946, that was changed by Mr. Sibert and Mr. Brewer alone, to this effect: Mr. Sibert, at Mr.

Brewer's request, gave him permission to put all he wanted to into his business because that business was his, after it was created, and it was the understanding that when he took a dollar home, that is, when Mr. Brewer took a dollar home he should pay an equal amount to the Paramount Pest Control Service; and that the profits were divided on a fifty-fifty basis because, no matter how large or how small the profits were, on [11] Mr. Brewer's business, that profit could have been plowed into the business to whatever extent Mr. Brewer determined was advisable, save for the obligation that when he took home a dollar he paid an equal amount to the company.

Mr. Sibert omitted to mention that to Mr. Hilts and the matter went on until December when he happened to recall it and then told Mr. Hilts and his associates, and then received approval and ratification for what had been done.

Under Mr. Brewer's statement, he claims he went down there in November and at that time this whole adjustment was made. The evidence, from our standpoint, will show quite the contrary; that there was no business mentioned in November; that it was a vacation trip by Brewer; that he and his wife stayed at the Sibert home as guests of the Siberts and that the most friendly and pleasant relations existed. The only time any business was discussed was when Mr. Brewer went to the office of the company to get some supplies.

This agreement that I have mentioned was to run to the first of the year only, that is, the dollar-home and dollar-company agreement was to run only to the first of the year, at which time it was presumed Mr. Brewer would have created sufficient capital that he could then go on the franchise, and that was undoubtedly Mr. Brewer's conception because in February he made a payment on the franchise, and we have the check to show it. On March 6th he made a payment and we have the check to [12] show it. On the 13th of March he made a final payment, the amount of that payment being consistent only with the amount that was then due under the franchise.

Then, intervening, between the dates of January 1, 1947, and March 13, 1947, Mr. Brewer complained that he should develop this Eastern Oregon territory, where there were large distances to cover and little in between, no towns of any population, a very extensive territory.

They made an agreement, which is entirely separate. It is set out in the pleadings. It was entirely separate and made in order to develop the territory and help Mr. Brewer to accomplish substantial promotion of this business. The Paramount Pest Control Service agreed to send two men to Portland or to Oregon and develop that territory, with a division of salaries and expense and profits and so forth. Only part of that is agreed to by the defendants.

But, because that did not turn out to be profit-

able—and this is the situation wherein we find ourselves very much in disagreement and, therefore, I mention it particularly to the Court. It was Paramount's own idea that they voluntarily give to Mr. Brewer—and it was done without his request and even without his knowledge, after consultation of Sibert and Hilts—a continuation of the dollar-home, dollar-company basis, and Mr. Brewer was written to that effect by a letter which will appear in evidence. There were one or two meetings, but of no particular [13] consequence, as I recall it, until June.

On June 1st, with Mr. Brewer, Mr. Sibert and Mr. Hilts present, they readjusted the whole transaction covering the whole year. They canceled that provision about the franchise, gave him credit for what he had never paid, and continued to carry on.

The principals seemed to be perfectly happy. In fact, Mr. Sibert bought the tickets, because it was Mr. Brewer's child's birthday—bought the tickets to Oakland, California, and they all went down for a very pleasant and satisfactory visit. While they were visiting there, word came in that there had not been some collections made and it was suggested Mr. Brewer was not a good collector, and they retired to their room in some huff and nothing more was said.

On the 24th of July, less than a month thereafter, Mr. Brewer wrote to Mr. Sibert his letter of resignation in which he said he was terminating his agreement as of August 1st, that is, about a week later.

Under his contract his obligation was to at least give the company ninety days' notice. He paid no attention to that. In fact, I think the evidence will show that Mr. Brewer's regard for the contract was something that might as well not have existed throughout this whole proceeding.

Then, with remarkable facility, these defendants started to acquire the contact and patronage that they had acquired at one time for Paramount Pest Control Service.

We have here the applications which are already in [14] evidence and admitted. We also have Mr. Brewer's own sworn reply, showing that from August 1, 1947, until the answer was made in November, he had acquired 141 of the accounts, patrons and customers of the Paramount Pest Control Service, which was definitely in violation, obviously in violation of his agreement.

That gives a running statement, I think, of all that is necessary to give the Court a general outline.

Just a word as to these exhibits. Exhibit No. 45 is a photostatic copy of the mortgage from Mr. Brewer to the Bank of California, which has just been procured. Opposing counsel has had a chance to observe it and reservation for it was made at the pre-trial.

As to Exhibit 28, I feel I ought to explain to opposing counsel that probably I made an error in connection with that. It is a bill of sale made by Sibert and Fisher, as a copartnership, to the Paramount Pest Control Service. There were two or three copies of it made, and I have here a carbon

copy that was fully signed by Mr. Sibert and Mr. Fisher. The copy that was entered in evidence had the notarial acknowledgment on it that this copy does not have, so when I put that in evidence I did not put the copy in evidence without the notarial certificate but I put the other in and it did not have Mr. Sibert's signature. I asked Mr. Sibert to sign it and I thought afterwards that I should have delayed that action on my part until after the Court had been advised and its permission secured, so I now formally call [15] attention of opposing counsel to that fact, and we can either strike Mr. Sibert's signature to that, if it is so desired, or we can introduce the one without the notarial acknowledgment, which does not add anything. I do not care what may be done, but I felt I should call it to the Court's attention.

In conclusion, I thank the Court for its attention in giving me this opportunity. I hope it has been of some assistance. It has been rather sketchy, I feel myself, but we feel that we should be entitled to injunctive relief. It seems to me there has been a complete violation of this agreement and we ask for such damages as the Court may find, from the evidence and these exhibits, that plaintiff is entitled to.

The Court: You have not discussed any law.

Mr. Rankin: No.

The Court: You just seem to take it for granted.

Mr. Rankin: I am perfectly willing to discuss the law. In fact, that has been Mr. Smith's prin-

principal duty. I didn't know that your Honor wanted it in an opening statement, but there are some cases in Oregon, particularly one case that, it seems to me, we could decide this case on alone. If we are going into any detailed discussion, I would like to have Mr. Smith cover that subject. He is familiar with it, having prepared the brief in the other trial.

It is to this effect, that where we have a contract whereby one party agrees, under proper consideration, to do [16] nothing to interfere with another party's business, that, while they are in restraint of trade, it is a legitimate restraint of trade if anywhere near reasonable, and three years is not unreasonable, not an unreasonable time as the authorities show. Therefore, this conspiracy charge is based on the fact that where he employed Rightmire and where the agent Brewer agreed not to solicit or not to go into a competitive business for a period of three years that the Court will say that that is a proper provision.

The Court: What is the Oregon case you say is the leading authority?

Mr. Rankin: What is the case, Mr. Smith?

The Court: What is the one you claim?

Mr. Smith: 161 Or. 65.

The Court: I will hear you, Mr. Bernard.

Mr. Bernard: I do not care, your Honor, particularly to repeat what I said in my opening statement at the pre-trial. Your Honor possibly will remember our position, that this contract was modified and that modification was to continue through-

out its term and then, suddenly, the plaintiff repudiated that modification, and it was for that reason that Mr. Brewer severed his connection with the company.

Briefly, as to the law—and I am preparing a brief on the subject, not yet in shape to hand to your Honor, but I will hand it to your Honor as quickly as I can get it done. It [17] is our contention, first, that in a case of this kind the burden is on the plaintiff to show that the contract was fair, the restrictive covenants reasonable, and that they have a real relation to and are really necessary for the protection of the plaintiff.

And, speaking of the fairness of this contract, taken in connection with the facts, this young man had been sent up here on a promise of a salary of \$250 a month; he had sold his home in California and one month afterwards he was told he must sign this contract or else he was through. In the various provisions in the contract there is only one thing that the plaintiff promised to do, and that was to furnish such advertising as they might think necessary. We will have something to say later as to the reasonableness of the contract under the circumstances.

Further, we claim the law to be that it must appear that the plaintiff has performed all obligations imposed on it by the contract before plaintiff is entitled to injunctive relief; further, that an injunction will be denied when it appears that plaintiff's conduct in obtaining the contract was unjust

or unfair or in plaintiff acts unjustly under the contract or if the contract is unjustly harsh, unfair or unreasonable or if the entire matter appears to be inequitable.

We will contend, your Honor, that regardless of consideration, the conduct of this company towards this man when [18] they sent him up here, the circumstances under which they obtained the contract, the nature of the contract itself and their repudiation of the modification of it would require this Court or at least give cause to this Court to deny any injunctive relief.

The Court: What did the plaintiff furnish under the contract?

Mr. Bernard: The plaintiff furnished nothing under the contract, your Honor. They furnished an opportunity to this young man to go into the pest control business. As we look at this contract, taking it by its four corners, they sent him up here and said, "You can go to work in the pest control business."

The Court: Why couldn't—

Mr. Bernard: I know what your Honor has in mind.

The Court: No, you don't. Why couldn't he have done it himself?

Mr. Bernard: He could have done it himself. I think you mean, by the terms of the contract.

The Court: Did they provide any financing?

Mr. Bernard: Provided no financing.

The Court: Provide materials and supplies?

Mr. Bernard: I think there were some supplies and materials to start in with, yes, although they were paid for.

The Court: For which he paid?

Mr. Bernard: For which he paid. They are charged against him. In other words, as I look on this contract, what they are [19] actually doing is to levy a 20 per cent tax on his gross business for the privilege of him going into the pest control business in Oregon. They furnished him really with nothing.

The Court: Is it any different from any other concern, say, that wants to open up a new territory somewhere, where they say, "We want you to go up there and work for us and want you to agree that, if you quit us, you won't, within a period of three years, go in the same kind of business?"

Mr. Bernard: There may be something for the Court to consider along the lines of public policy.

The Court: Is it any different from what frequently happens in the commercial world where some concern says, "We are going to open up an agency in Los Angeles," for example, or take a case nearer home. Let's take a case here in Oregon and, as time goes on, they send men out to open up new territories. Is that the question here, whether a man could go out and open up a new territory and bind himself not to go into a competitive business?

Mr. Bernard: That is the very question, your Honor, whether or not they could enforce a contract of that kind.

The Court: Are contracts of that kind enforceable in equity?

Mr. Bernard: I don't think so, no. In other words, I think plaintiff should have been required to furnish something except the mere opportunity to go out and go to work.

The Court: Do you want to speak further, Mr. Rankin?

Mr. Rankin: No, your Honor. [20]

The Court: All right. Proceed with the testimony.

Mr. Smith: May it please the Court, I would like to submit to the Court a trial brief which has been prepared on the subject of contracts, the validity of agreements in restraint of trade, and so forth. At the same time I will give a copy to counsel for the defendants and at this time would also like to request that if the defendants have any citations of authorities in support of their contentions that such a contract is unreasonable, we would appreciate it very much having those citations in ample time so that we may go to the Law Library and study the question in the intervening time and be able to make our arguments at the proper time.

The Court: We have no jury here. Mr. Bernard said he would complete his memorandum as soon as he can. I imagine that will be some time during the day.

Mr. Bernard: I do not want to deceive the Court. It may take me a day or two to get that memorandum in shape. I thought this, your Honor,

it being a case before the Court, that even though I handed it up promptly at the end of the case they would have an opportunity to reply.

The Court: Mr. Smith has just made a special request that if you have any authorities now he would like you to give them to him.

Mr. Bernard: I will have to give them to him later.

Mr. Rankin: If the Court please, I would like at this time [21] to move the admission, for the purpose of this case, of Mr. Kenneth C. Gillis, an attorney of Oakland, California, admitted to practice in both the State and Federal Courts in the State of California.

The Court: Is that satisfactory to you?

Mr. Stott: Yes, your Honor.

The Court: Very well. Proceed.

THEODORE C. SIBERT

was thereupon produced as a witness on behalf of plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rankin:

Q. What is your name, please?

A. Theodore C. Sibert.

Q. Where do you live, Mr. Sibert?

A. 1139 Sunny Hills Road, Oakland, California.

Q. What is your business?

A. I am President of the Paramount Pest Control Service.

(Testimony of Theodore C. Sibert.)

Q. How long have you been in the pest control service?

A. I first started in 1927, not steady, but I have been pretty close to the pest control service for around twenty years.

Q. When you say "not steady," what else did you do?

A. I am a cement finisher, a carpenter and a plasterer. I served an apprenticeship as carpenter—— [22]

Q. Did you, while you were carrying on these trades, also endeavor to do something in the nature of pest control?

A. I have been associated with pest control since 1927, working part time.

Q. Who was associated with you, if anyone?

A. Mr. Watson T. Moore.

Q. Anyone else?

A. Working for the Western Exterminating Company.

Q. Anyone else?

A. Mr. Charles Brewer and many others.

Q. Concerning your original enterprise, was it a partnership or corporation?

A. Co-partnership.

Q. Who was your partner?

A. Glenn H. Fisher.

Q. How long were you and Mr. Fisher in partnership?

A. November 15, in 1938, we started the Paramount Pest Control Service.

(Testimony of Theodore C. Sibert.)

Q. To when?

A. About July 1st, around July 1st or something, 1946.

Q. What did you do then?

A. We formed a corporation.

Q. Is that corporation the plaintiff in this case, the Paramount Pest Control Service?

A. It is. [23]

Q. When did you come to Oregon?

A. Came to Oregon July 1, 1942.

Q. How did you happen to come to Oregon?

A. Because of the request of the S. P. Railroad Company, handling their business in Oregon.

Q. Had they been a previous client of yours in the State of California? A. Yes.

Q. The Court has indicated he wants us to move along, so will you briefly give a summary or a brief sketch of the pest control business and how you built it up and what it amounts to at the present time?

A. Well, Mr. Fisher and I started the Paramount Pest Control Service November 15, 1938. He had been previously in business for two and a half years by himself. We *didn't enough* work to keep us both going, so I worked with my carpenter tools, my carpenter's trade, daytime, and he solicited on the street, and he done his work right at the office, and we done the work on a Sunday or whenever we could. We worked pretty hard for years.

(Testimony of Theodore C. Sibert.)

We had a new idea. Our idea was this, to formulate the best of chemicals, that is, the best on the market. We had had quite a lot of experience in chemicals before and in servicing and applying them to pests or rats, or whatever we tried to kill.

So, we decided not to sell the chemicals and to service these places, sign this work up, so much for the cleanup the first month and then so much each month thereafter, and this took in a wonderful way. We attained as near 100 per cent as we could in controlling of all disease-carrying pests pertaining to structural. We worked pretty hard.

Q. What do you mean by saying you "worked pretty hard"?

A. That is what I was about to tell you. We worked sixteen and twenty hours a day. There was many weeks I didn't take off my shoes, only to change my socks and wash my feet, and just lay down on the couch.

Q. What ingredients did you use in your business? A. I don't understand the question.

Q. What did you do with pest control? How did you control pests? How did you kill them?

A. Well, we have our own laboratories; we have research and we take chemicals and we formulate them applicable to a certain type of insect or that certain type of rodent, or whatever the problem might be. We train men.

Q. Train them to do what, Mr. Sibert?

A. We train men along the lines of formulating that is necessary, and how to apply that chem-

(Testimony of Theodore C. Sibert.)

ical, that poison that we leave in there, foodstuffs especially, and to have the right amounts in the right containers; and then train them to keep clean and so that they don't do things that they shouldn't on the job. It is quite extensive training. It is very unique. [25]

Mr. Rankin: At this time, your Honor, the witness having testified that they were incorporated, we would like to offer in evidence—and if we can keep these exhibits in the same order, giving them the same numbers, it will aid greatly in many respects.

The Court: Why not put in all the exhibits at once?

Mr. Rankin: That is all right with me, your Honor. Counsel has had them and has looked them over. Have you any objection to any of these exhibits?

Mr. Bernard: There are some exhibits in there that deal with some person's memoranda as to accounts. Of course, we object to those as being hearsay unless they are proved by some witness.

Mr. Rankin: I think that objection would be proper, your Honor. If counsel will point them out——

The Court: No, we will do it like we do in all cases like this. All of the exhibits that have been marked for identification on both sides will be admitted as exhibits in the trial, taking the same numbers and being subject to any objections that

(Testimony of Theodore C. Sibert.)

may heretofore have been made or may hereafter be stated.

(The following Plaintiff's Exhibits were thereupon received in evidence and marked as follows:) [26]

Plaintiff's
Exhibit No.

Description

- | | |
|-------------------|--|
| 1 | Articles of Incorporation of Paramount Pest Control Service. |
| 2 | Declaration of Purpose to Engage in Business in Oregon. |
| 3 | Certificate of Authority to Engage in Business in the State of Oregon. |
| 4 | Receipt for fees, Corporation Department, State of Oregon. |
| 5-1
to
5-26 | Labels—Paramount Pest Control Service. |
| 6-1
to
6-7 | |
| | |
| 7 | Rules and Regulations of Paramount Pest Control Service. |
| 8 | Rules and Regulations of Paramount Pest Control Service. |
| 9 | Rules and Regulations of Paramount Pest Control Service. |
| 10 | Safety Rules in Using Compound 1080. |
| 11 | Form of Service Order for Paramount Pest Control Service. |
| 12 | Form in re service performed. |
| 13 | Form of receipt—Paramount Pest Control Service. |
| 14 | Duplicate copy of receipt. |
| 15 | Application of Charles P. Brewer for Employment. |

(Testimony of Theodore C. Sibert.)

Plaintiff's

Exhibit No.

Description

- | | |
|------|---|
| 16 | Employment Application Blank—Carl Robert Duncan. |
| 16-A | Form of Application — Paramount Pest Control Service. |
| 17 | Form of Application for Registration of Economic Poisons—State of California. |
| 17-A | Form, Application for Structural Pest Control Operator's License. |
| 18 | Form of Application for Structural Pest Control Field Representative's License. |
| 19 | Form of Application for Fidelity Insurance, The Fidelity & Casualty Company of New York. |
| 20 | Copy of By-Laws for Internal Administration of Structural Pest Control Board. |
| 20-A | Copy of By-Laws for Internal Administration—Structural Pest Control Board. |
| 21 | Copy of By-Laws for Internal Administration of Structural Pest Control Board. |
| 21-A | Copy of By-Laws for Internal Administration—Structural Pest Control Board. |
| 22 | Time Reports—Carl Duncan. |
| 23 | Time Reports—Raymond Rightmire. |
| 24 | Copy of Publication "Pest Control and Sanitation," September, 1947. |
| 25 | Copy of publication issued by Julius Hyman & Company, Denver, Colorado, "OCTA-KLOR," May, 1947. |
| 26 | Copy of publication of Socony-Vacuum Oil Co., "Technical Bulletin," June, 1947. |
| 27 | Sales Agent's Agreement with Paramount Pest Control Service and Charles P. Brewer. |
| 28 | Bill of Sale from co-partnership to corporation, Paramount Pest Control Service. |
| 29 | Copy of letter March 15, 1947, H. W. Hilts to Charles Brewer. |

(Testimony of Theodore C. Sibert.)

Plaintiff's

Exhibit No.

Description

- | | |
|------|--|
| 30 | Check dated February 6, 1947, \$338.00, to Paramount Pest Control Service. |
| 31 | Supporting Voucher No. 181. |
| 32 | Check dated March 6, 1947, \$250.00, to Paramount Pest Control Service. |
| 33 | Supporting Voucher No. 229. |
| 34 | Check dated March 13, 1947, \$494.25, to Paramount Pest Control Service. |
| 35 | Supporting Voucher No. 244. |
| 36 | Accounting as of June 30, 1947, between Hiltz and Brewer. |
| 37 | Check dated July 9, 1947, \$259.61, to Paramount Pest Control Service. |
| 38 | Supporting Voucher No. 413. |
| 39 | Statement of Accounting on Franchise for July, 1947. |
| 40 | Tabulation in re Eastern Oregon Expense. |
| 40-A | Indenture of Lease, The House of Celsi, Lessor, Paramount Pest Control Service by Charles P. Brewer, Lessee. |
| 40-B | Sign entitled "To Our Patrons," Paramount Pest Control Service. |
| 40-C | Sign "Patrons"—Brewer's Pest Control. |
| 42 | Letter, July 24, 1947, Charles P. Brewer to T. C. Sibert. |
| 43 | Check dated March 3, 1947, \$226.00, to Kelly Motors. |
| 44 | Supporting Voucher No. 203. |
| 45 | Photostatic copy of Chattel Mortgage executed by Charles P. Brewer, \$1,052.63, to Bank of California N.A. |
| 46 | Photostatic copy of Assumed Business Name Certificate, Brewer Pest Control. |
| 47 | Photostatic copy of Certificate of Retirement, Brewer's Pest Control. |

(Testimony of Theodore C. Sibert.)

Plaintiff's

Exhibit No.

Description

- 48 Photostatic copy of Assumed Business Name Certificate, Brewer's Pest Control.
- 49 Statement of Accounting on Franchise for January and February, 1947.
- 50 Statement of Assets taken over by Charles P. Brewer.
- 51 List of Accounts totaling \$925.89.
- 51-A Statement entitled "Eastern Oregon State Run"—Total Revenue, \$1357.00.
- 53 State of Expense, \$3596.95.
- 54 File of "Canceled Accounts with Time to Run as Per Contract.
- 55 File of "List of Accounts on Books" Longer than one year and canceled because of Brewer action.
- 56 Copy of letter dated October 22, 1947, Attorneys for Paramount Pest Control Service to Charles P. Brewer.
- 57 Profit & Loss Statement, January 1 through February 28, 1947.
- 58 Profit & Loss Statement, January 1 through March 31, 1947.
- 58-A Profit & Loss Statement, January 1 through March 31, 1947.
- 59 Balance Statement, January 1 through April 30, 1947.
- 59-A Portland Profit & Loss Statement, January 1 through April 30, 1947.
- 60 Profit & Loss Statement, January 1 through May 31, 1947.
- 60-A Balance Statement, May 31, 1947.
- 61 Balance Statement, June 30, 1947.
- 61-A Profit and Loss Statement, January 1 to June 30, 1947.

(Testimony of Theodore C. Sibert.)

Plaintiff's Exhibit No.	Description
61-B	Trial Balance, June 30, 1947.
62	Copy of Complaint in Circuit Court of the State of Oregon, Paramount Pest Control Service v. Charles P. Brewer, et al.
63	Copy of Notice to Produce in Cause No. 178013, Circuit Court of the State of Oregon.
64	Check dated September 10, 1947, payable to Conger Printing Co., signed "Brewer's Pest Control."
65	Check dated October 17, 1947, payable to Conger Printing Co., signed "Brewer's Pest Control."
66	Check dated October 10, 1947, payable to Conger Printing Co., signed "Brewer's Pest Control."
67	Form of Receipt—Brewer's Pest Control.
68	Form to be signed by customer—Brewer's Pest Control.
69	Business Card, Brewer's Pest Control.
70	Form of Service Order—Brewer's Pest Control.
71	Form of Daily Report—Brewer's Pest Control.
72	Form of Statement—Brewer's Pest Control.
73	Envelope bearing return address "Brewer's Pest Control" (small size).
74	Envelope (large size) bearing return address "Brewer's Pest Control."
75	Letterhead—Brewer's Pest Control.

Mr. Rankin: Your Honor, the first exhibits relating to the corporation, I anticipate there is no objection to them.

The Court: They are all in.

Q. (By Mr. Rankin): Mr. Sibert, I would like to hand to you Plaintiff's Exhibit No. 5, sub-numbered No. 5-1 to No. 5-26, and ask you to state, after

(Testimony of Theodore C. Sibert.)

having reviewed those, whether they are poisons that are put out by your company, labels of poisons put out by your company?

The Court: You know what they are. You have seen them. Are they covering your material?

A. Yes.

Q. (By Mr. Rankin): Are they poisons put out by your company? A. They are, sir.

Q. Are all of these poisons such as you can buy on the common market? A. No, sir.

Q. How many are there altogether? Twenty-six? A. Twenty-six here, sir. [33]

Q. What proportion of those can you buy on the common market, not under your name but which are common poisons that you can buy?

A. What proportion of these chemicals?

Q. What proportion of these poisons represented by these labels can you buy on the common market?

A. These chemicals are not for sale. They are for use in the service department.

Q. If they contain poisons that are not unique in your business but are common on the market, how many of those are covered by these labels?

A. There is thirty-one poisons which we have registered—there is five that is basic poisons which we have to register.

Q. You say you have to register. Just what do you mean by that?

A. Because of the strict laws, the Economic Poisons License of California. It is a package law,

(Testimony of Theodore C. Sibert.)

sir, and it is the Economic Poisons Law—As long as you are a reliable company and have chemists and the equipment to formulate these poisons and to package them and put your label on and the correct amount of the compound, the amounts in the poisons, the exact amount to the gram of the poisons and the exact amount to the gram of the inert ingredients.

Q. You say there are five basic poisons?

A. Five basic poisons, yes. There are thirty-one poisons that we have registered. [34]

Q. You said that. A. Yes.

Q. Five of them are basic?

A. There are chemicals that you buy that are not basic, what are common poisons, because you can buy those on the market.

Q. As to the other twenty-six you describe, is there anything done by your company in connection with those? A. Yes.

Q. Is what you do unique or different from those that you get on the common market?

A. It is, sir.

Q. Have you any man in your employ who, as a part of his duty, has anything to do in connection with these poisons? A. I have Mr. Bushing.

Q. What is his department in your company?

A. He is an entomologist and chemist, a teacher to teach the men, our men, how to handle poisons, especially how to handle poisons safely.

Q. Does your business require any knowledge as to the pests? A. It does, sir.

(Testimony of Theodore C. Sibert.)

Q. What knowledge do you have to have in order to handle pests?

A. You have to have quite a lot of knowledge because it is like this: One insect, it takes one poison to kill that one insect; and some poisons will not apply to that insect, and you have to know how to identify that insect, so, therefore, we have a [35] school and have an entomologist, and that is the service that you get—something that the boys on the road don't have. He is always there. They send insect specimens in to him and they are correctly identified and the exact formulation is prescribed, just what and how much to use to take care of the insect.

Q. Suppose you gave too much poison, would that still kill the insect?

A. Certain poisons does not kill if you give too much.

Q. To what do you refer, generally?

A. Well, arsenic—too much arsenic will not kill. There are certain poisons in here that are repulsive, that a person could not take—it is repulsive.

Q. Do you know of any other pest control service that has a branch instructing its men?

A. Not on the Coast, sir.

Q. Do you require your employees to have any training?

A. We have to train all employees because of the safety, because in California there is a very strict law. We have the Structural Pest Control Board

(Testimony of Theodore C. Sibert.)

in California, and everybody that works in this industry in California must pass a written examination under the Board, and it makes a profession out of this business.

Q. In what states do you do business?

A. Do business in California, Oregon and Washington and Arizona.

Q. The law of which state or states do you find the most exacting? [36]

A. California.

Q. Have you complied with all the laws of California in respect to your business? A. Yes.

Q. Do you, as a matter of fact, thereby also conform to the requirements of the other states?

A. We run our business according to the laws of California.

Q. Will you look at the set of exhibits that you have before you? A. Yes.

Q. Explain to the Court how those various instruments are used in connection with your business?

A. Exhibit 6?

Q. Just a moment, Mr. Sibert. The exhibit starts with No. 6-1.

A. I have it now, sir. This is literature that is got out by Mr. Bushing.

Q. What it is, please? Just explain how it fits in with your training of your employees?

A. We set these boys right on the correct identification of all pests and those especially what we have the most of, and we formulate the information

(Testimony of Theodore C. Sibert.)

to give to all the men to study so that they can be better men and can identify these pests and insects which they have to work with at all times.

Q. Take Exhibit 6-1. What is that? How does that bear on this matter? A. This is bedbugs.

Q. What about it?

A. Well, it explains the type of injury that would result from the bite of a bedbug and what diseases it carries when it bites.

Q. What do you do with that pamphlet that gives that information?

A. We mimeograph these off and give them to all men that works for us.

Q. Take No. 6-2, "White-Footed Mice."

A. This is instruction on a very uncommon mouse and information that the boys should need. It gives identification and gives all measures to handle this certain type of mouse.

Q. You mean, to identify the mouse so that it can be killed? A. That is right.

Q. Take No. 6-3.

A. Clothes moths, the importance and type of injury, food of the moth, and giving the chemicals that should be used and the type of inert ingredients, history and habits, and then control measures, and we explain exactly what should be done.

Q. What do you mean by "inert ingredients"?

A. Inert ingredients is to carry all the poisons, to formulate certain poisons together so that they will be compounded to give a certain type of poison

(Testimony of Theodore C. Sibert.)

that will do a certain job, to take care of that certain type of rodent or that certain type of insect.

Q. Are inert ingredients themselves poisons, necessarily? A. Not necessarily.

Q. When your labels mention active and inert ingredients, what [38] are the active ingredients, generally speaking?

A. They are the poisons that is found. These poisons, every one of them, is inspected once a year by the Economic Poisons License Department. They come right out to the boys on the job and they take them out of the can. These poisons must be labeled. They take a certain portion of a certain specimen once a year to see that these poisons are exactly as on the label.

Q. Do you have to show the content of all these poisons on the labels? A. We do.

Q. Do you have to show what the inert ingredients are? A. No.

Q. How do you find out what inert ingredient to use?

A. We have to experiment as to what inert ingredients to use.

Q. These articles or papers you are mentioning here, under this Exhibit 6-1 to 6-7, are they given to the employees for their instruction and use and training, such as you have already stated?

A. They are, sir.

Q. Take Exhibit No. 6-4, "Carpet Beetles or Buffalo Beetles."

(Testimony of Theodore C. Sibert.)

A. It has to do with the importance and type of injury. If you were not trained, you wouldn't know the difference between clothes moths and these. It is entirely different. They have an entirely different chemical, an entirely different application to take care of them. This explains the food and distribution, and how they [39] come and where they are found. They are found different places, and they hibernate. This shows the life history, appearance and habits, and of course the control measures, how to take care of them and what chemicals to use.

Q. Take Exhibit 6-5. A. Yes.

Q. What is that?

A. That is what we call the "Bug House Questionnaire."

Q. Does that apply to the bug itself or what?

A. This applies to the man after he is taught and goes to school. He is sent this "Bug House Questionnaire" containing true and false questions to see and get his IQ to see what he is getting out of his studies.

Q. Suppose he does not answer the questions properly?

A. Then we go to his superior, whoever he is working for, and see what is wrong.

Q. Suppose he answers them excellently, what happens then?

A. Then that is in his favor.

Q. What happens? Does he get any work because of that?

(Testimony of Theodore C. Sibert.)

A. We don't have priorities. It is the man that knows how to do the job and knows exactly what is best for his job, he goes forward best.

Q. What about Exhibit 6-6?

A. That is another "Bug House Questionnaire" covering rats and mice, bedbugs, silverfish and fleas, carpet beetles, moths and [40] ants.

Q. Silverfish, what is that?

A. Silverfish is an insect.

Q. Is that of the same nature of a questionnaire as we just got through with?

A. This is the same nature of a questionnaire.

Q. Take Exhibit 7. A. 6-7?

Q. Yes. What is 6-7?

A. This is a report of sodium fluoroacetate baiting. This poison is very dangerous itself, so dangerous itself that there is no known antidote. It is very hard to get. No company can buy it without they are an established company. These are poisons that whenever a man uses them in training, or otherwise, he has to fill out one of these reports as to where he puts his bait, and then keep a complete account of that bait, of that poison.

Q. You say you can't buy it, that not everyone can buy that?

A. The company that makes this certain chemical insists that you are an established company and have quite a large liability insurance. They don't undertake the liability themselves.

Q. When you say "quite large," what do you mean by that? A. At least 40 and 80.

(Testimony of Theodore C. Sibert.)

Q. What do you mean?

A. If one person gets injured, \$40,000; if there is a bunch of [41] them, they divide the \$80,000.

Q. You have to furnish a bond before you can buy it?

A. There is a bond that you have to have.

Q. Are there many companies that manufacture that kind of poison?

A. There is only one company that manufactures this poison.

Q. Why? Is their supply abundant or not?

A. Very limited.

Q. Take a concern that was just starting in, perfectly new, could they go out and purchase it?

A. Well, they would have to furnish their bond. I don't know, but it would be very hard if they did.

Q. Take Exhibit No. 7.

A. That is Rules and Regulations of the Paramount Pest Control Service. When a man comes to work for us, we talk to him quite a while and we hand him the Rules and Regulations to read. This has to do with how to keep clean and how to handle your kits and how to protect themselves. A man must understand he has to be careful, and he has to use the things we furnish him.

Q. Is that signed? A. It is signed.

Q. It is signed by whom?

A. Signed by Rightmire, Raymond L. Rightmire.

(Testimony of Theodore C. Sibert.)

Q. Look at Exhibit No. 8, please.

A. This is another copy of Rules and Regulations.

Q. Is that signed? [42] A. Yes.

Q. Whom is that signed by?

A. Carl Duncan.

Q. Look at Exhibit No. 9.

A. That is another copy of Rules and Regulations.

Q. How does it relate to the others?

A. Every once in a while we have to change these; change them a little bit. This is a new one.

Q. Look at Exhibit No. 10.

A. Safety Rules in Using Compound 1080.

Q. What is Compound 1080?

A. Sodium fluoroacetate.

Q. Is it dangerous or not?

A. Very dangerous. These are the safety rules in using it. It tells just exactly what it is, where it comes from, the lethal dose. No employees are allowed—they are not even allowed to dilute it. We do not allow them to handle it. It is told here just exactly what they have to do.

Q. Do you have rules relating to the service of the employees and how they should serve your company for their own protection and for sanitation and so forth? A. We do.

Q. See if Exhibit No. 11 has any bearing on this?

A. Exhibit No. 11 is the general service order, or our contract.

(Testimony of Theodore C. Sibert.)

Q. That is Form 7, I believe. How do you handle that? [43] A. Form 7. This is Form 7.

Q. Well, I don't care about the form number. It is Exhibit 11 and it is called "Service Order."

A. Yes.

Q. How do you handle that? Just explain to the Court what function it has in your business?

A. This is a general service order which it takes a licensed man in the State of California to carry. California does not allow you to identify pests without you have a license in that state to do that job.

Q. Did Mr. Brewer have any license in California? A. He did not.

Q. Go ahead.

A. This is for general pest control. It has the name and address, the service, the type of property and the order number, the time of starting and who you see, and it has most of the pests that we have in general, and the date and price and conditions, and the length of the contract.

Q. When do you get that?

A. We get this before we start to work on the job.

Q. Whom is it signed by?

A. It is signed by an official salesman or usually the branch manager in the district.

Q. Anyone else?

A. It is also signed by the customer. [44]

Q. Is that a contract between you and the customer, is that what you mean? A. It is, sir.

(Testimony of Theodore C. Sibert.)

Q. Exhibit No. 11 is what?

A. It is a service order.

Q. What is the next exhibit?

A. It gives——

Q. Pardon?

A. It gives the name, address, remarks, and space for the condition of the job, signed by the operator and the customer.

Q. What is the next exhibit?

A. Receipt, in duplicate. When one of our servicemen has to collect money, he gives a duplicate receipt. These are numbered and he must account for the numbers.

Q. Whom does the duplicate go to?

A. The duplicate goes to the owner and he brings the other in with the money, the cash.

Q. How about Exhibit No. 15? Does that have any bearing on your business?

A. This is an application blank.

Q. When do you require applications?

A. When a man comes in to ask us for work, if we are interested or think he would make an operator, we ask him to fill out an application blank. Then we more or less investigate and talk it over and when we need a man we pull these application blanks out, [45] and the one we want we call in, or get them in and give them a chance to work for us.

Q. Do you know whose application blank that is?

A. I do. This is Charles Brewer, Charles P. Brewer.

(Testimony of Theodore C. Sibert.)

Q. Does that application state whether he had any previous experience in pest control or not?

A. It does. He had no previous experience.

Q. So far as you now, either from this application or otherwise, had Charles P. Brewer any experience or service or training in pest control prior to the time he came to work for the Paramount Pest Control Service?

A. His application says none.

Q. What is Exhibit No. 16? A. 16?

Q. Yes.

A. That is another application blank.

Q. Is it like the other one or more recent in form?

A. No, it is a little later one. This is an earlier one.

Q. What is No. 17?

A. This is No. 16 is filled out.

Q. What is No. 17?

A. It is an application blank.

Q. An application blank? A. Yes.

Q. What is No. 17? [46]

A. You misunderstood me, Counsellor. 17 is the blank one. 16 is filled out.

Q. What is 17?

A. It is the latest application form we have.

Q. For what purpose?

A. When a man comes to work for us, or we are interested in him, we will have him fill an application form out.

(Testimony of Theodore C. Sibert.)

Q. Isn't that for the registration of poisons?

A. No, sir.

Q. Isn't it?

A. Yes; I am sorry, sir, it is. I had the wrong one.

Q. Yes.

A. No. 17 is an "Application for Registration of Economic Poisons," under the Department of Agriculture in California.

Q. Explain why that is required, if it is, and what is done with it?

A. This controls the packaging laws of the State of California. It controls any poisons that is packaged. It has to be registered in the correct formula, with the amounts of poisons, and the skull and cross-bones on it, and the antidote, and the date and address where they are packaged and put into the formulation and sealed, sir.

Q. Referring back to that series of exhibits numbered 5-1 to 5-26, relating to your labels, is there any particular designation on those relating to your products? [47]

A. These are all products that we have formulated.

Q. Get my question. Is there any particular designation on them?

A. This is a license, an application to register.

Q. No. I am not talking about that now, Mr. Sibert. I am calling your attention again to the labels in Exhibit No. 5-1 to No. 5-26. Is there any

(Testimony of Theodore C. Sibert.)

particular designation on those labels relating particularly to your products?

A. These are all our products, every one of them labels.

Q. Is there any particular designation on them relating to your products? What about that man on there? A. This man is our trade-mark.

Q. What is it there? What does it say?

A. "Doc Kilzum, his patients all die."

Q. Is that your trade-mark?

A. That is our trade-mark.

Q. That is what you put out?

A. That is right.

Q. Going back to Exhibit No. 17-A, what does that relate to?

A. This is an application for Structural Pest Control Operator's License.

Q. How is that required and what do you do under it?

A. Under this application you are—the law says you must be in the pest control business in California at least one year before you are allowed to apply for the operator's license of [48] California. This is the written examination under the State Board of Structural Pest Control of California.

Q. What is No. 18?

A. "Structural Pest Control Field Representative's License."

Q. What is the difference between the field representative's and the operator's license?

(Testimony of Theodore C. Sibert.)

A. This field representative is a worker or serviceman.

Q. What is No. 19?

A. Application for a bond, Fidelity and Casualty Company of New York.

Q. Do you procure bonds on employees?

A. After a man goes to work for me, he fills this application out and we procure the bond.

Q. Is that required?

A. That is required of every employee.

Q. What is No. 20?

A. By-laws of the Structural Pest Control Board, instructions to applicants for a field representative's license, how to apply, and the conditions of study.

Q. What is the Structural Pest Control Board?

A. The Structural Pest Control Board is elected direct by the Governor of the State.

Q. Elected? You mean appointed?

A. They are appointed, yes, as a rule.

Q. Yes. [49]

A. They are appointed in judgment over the businessmen of the structural pest control in California, to see that they live up to the regulations and rules which they set forth.

Q. Is it limited to the State of California?

A. That is limited to the State of California.

Q. This particular instrument, Exhibit 20, what is that?

A. This is instructions to applicants for a field representative's license?

(Testimony of Theodore C. Sibert.)

Q. Then a field representative, as I understand it, is not only under your direction but under the direction of the Board? A. That is right.

Q. No. 20-A, what is that?

A. This is the same, only different; instructions to applicants for an operator's license. I mean for an operator, not a field representative's. Sorry. This is sent from the State Board of California to the operator with instructions.

Q. What about No. 21?

A. This relates to the examination and the details of—it says "Bylaws for the Internal Administration of the Structural Pest Control Board."

Q. What measure do you take, Mr. Sibert, when you have employed a man who is qualified in all these respects to serve the company in the pest control service, to keep track of what he is doing?

A. I don't quite understand your question.

Q. Say that you have a man in your service now. He is qualified, [50] otherwise. How do you keep track of him after you get him employed?

A. We have our service slips that they turn in every day, a time sheet showing what work they did for that day.

Q. Will you examine the next exhibit, No. 22, and see if that has anything to do with the matter?

A. Time reports. We have time reports. We know where every man is and wherever he works that day, by our system we have in the office.

Q. Whose time report is that?

A. Carl Duncan's.

(Testimony of Theodore C. Sibert.)

Q. Covering what particular time?

A. The week ending May 11, 1946.

Q. How many sheets are in that exhibit relating to Carl Duncan? A. Eleven—ten.

Q. Where do those sheets show that he did that work? A. In Portland.

Q. What was he doing in Portland, Oregon, in May, 1946?

A. Instructing Charlie Brewer and his men, breaking them in to show them how we have safety laws, breaking them in to the extermination field.

Q. Why was that necessary with respect to Charlie Brewer?

A. When he was sent up here, he wanted to keep an instructor here to help him.

Q. Do I understand you that he had not completed a sufficient [51] course to know what to do up here? A. That is right.

Q. How long did he continue under your instructions?

A. Mr. Carl Duncan was in the employ of Charlie Brewer, as of the letter of the 24th.

Q. The 24th? A. Of June—July.

Q. What year? A. 1947.

Q. You mean by that he was continuously under the instruction of Carl Duncan?

A. So far as working up here was concerned. Carl Duncan was our field instructor.

Q. Was Brewer continuously under his instruction? A. That is right.

Q. What is Exhibit No. 23?

(Testimony of Theodore C. Sibert.)

A. It is the time slips for Raymond Rightmire.

Q. Located where?

A. Portland, Oregon.

Q. What was Rightmire doing here?

A. He is a serviceman.

Q. What do you mean by "serviceman"? What did he do?

A. Service; puts out poisons and takes care of our instructions, how to do certain things.

Q. State whether or not, after having trained these men, you [52] make any effort to keep them abreast of the times on any products?

A. Yes. We get all the literature we can that is put out. Mr. Bushing has contacts and that literature is sent out to him—sent out to the field men by the branch manager or franchise manager.

Q. Look at Exhibit 24 and state what that is?

A. This is an authorized magazine, I know. It is wonderful information that is in these magazines for a pest control operator.

Q. What is the name of that?

A. "Pest Control and Sanitation, Home and Garden."

Q. Is that provided to employees?

A. We buy this magazine and send it to the branches, so the employees can have it.

Q. Look at Exhibit No. 25.

A. This is also the same information from Hyman & Company, Denver.

Q. Relating to what?

A. Insect information.

(Testimony of Theodore C. Sibert.)

Q. Was that also provided for the employees?

A. It is.

Q. Is it a good publication?

A. It is a good publication.

Q. What is No. 26? [53]

A. The same material. That is something new in the field; spray barns for flies. It is a very good publication.

Q. Now, Mr. Sibert, have you in general, without going into great detail, covered your pest control business, beginning with the training of the employees and what is done to keep them acquainted with the progress of pest control, in general? In general, have you covered that?

A. I believe I have, in general, sir.

Q. How long have you known Charles P. Brewer? A. I believe in October, 1945.

Q. What was the occasion of your meeting him?

A. I met him in a home in Oakland, California.

Q. Did you subsequently come to be associated with him in business? A. Yes.

Q. How did that occur, and when did it occur?

A. Mr. Brewer came into my office the first of the year, 1946, and asked for a possible opening up in the northern country. He said he was born in Spokane and would like to come up here, in this part of the country.

Q. What did you do?

A. I took his application and told him if anything came up we would let him know.

Q. Is that Exhibit 15 that you have already

(Testimony of Theodore C. Sibert.)

mentioned? A. That is his application, sir.

Q. What then happened after you took his application in January?

A. There was an opening come up and he happened to come in just about the time there was an opening come up in Portland.

Q. When did he start training for the Paramount Pest Control Service?

A. February 4, 1946.

Q. How long did he train?

A. He come up while he was still in training.

Q. Did he subsequently come to the Northwest?

A. He come to the Northwest around April 1st.

Q. Whom was he serving at that time? In whose employ was he?

A. In the Paramount Pest Control Service.

Q. What was it at that time?

A. A co-partnership.

Q. A co-partnership of Fisher and yourself?

A. That is right.

Q. How long did that continue?

A. To the first of July.

Q. What happened then?

A. He started on a franchise basis, 80-20, sir.

Q. Now, it is claimed by the defendant, Brewer, in this case, and stated to the Court in opposing counsel's opening statement, that he was practically compelled to accept this franchise agreement of July 1, 1946. State whether or not Mr. Brewer had [55] signed the franchise agreement prior to that time?

(Testimony of Theodore C. Sibert.)

A. Mr. Brewer, before he came to work for us, was hired specifically for this job; we showed him the basis on which we worked men in this country; we gave him the exact terms which he signed and was working under and he took them home, and he knew exactly the basis—in fact, he made us promise before he came up here just what basis he would work on, and we kept our word.

Q. Did he sign any instrument at the time he came up here in April? A. He did.

Q. What was that?

A. That was a branch manager agreement.

Q. Did he read it before he signed it?

A. He did.

Q. When it came to the franchise—you call it a franchise. When he made his sales agent's agreement of July 1, 1946, when did Mr. Brewer get a copy of that? Can you give the date and time?

A. Yes.

Q. When was it?

A. He got a copy of that two days before he come to work for us and took it home. You mean of this specific—he got a copy of the exact——

Q. That does not mean anything. [56]

A. The difference is it is blank.

Q. You say it is blank?

A. No. The district in which he works and his boundary lines, exactly the same.

Q. Otherwise the form you gave him was exactly the same as the executed franchise?

A. It is, sir.

(Testimony of Theodore C. Sibert.)

Q. When did he get that form?

A. Two days before he came to work. That would be February 2nd. You mean this form in front of us?

Q. Yes.

A. This form, he got that the first of July.

Q. When did he get that form so that he could know the contents of this exhibit?

A. He had it two days before he came to work, which would be February 2nd.

Q. Then, do I understand you correctly that you say he knew of this franchise form from February, 1946, to July, 1946?

A. Yes, sir.

Q. Did he ever ask you any questions about it?

A. No, sir. Excuse me. Correction, sir. We had talked it over as to the things about it and he asked questions at that time before he went to work for us.

Q. Before he went to work?

A. Yes. [57]

Q. At the time he signed this exhibit, No. 7, the sales agent's franchise, did he know the contents of it?

A. They were explained to him, yes, sir.

Q. Do you recall where Mr. Brewer signed that agreement.

A. Signed that agreement in Portland.

Q. Where was it signed by Mr. Fisher?

A. In Oakland.

Q. Has that agreement been recognized by the parties since it was signed?

A. It has.

(Testimony of Theodore C. Sibert.)

Q. After July 1, 1946, how long was it before the instrument was actually signed, do you know, by both parties?

A. Mr. Brewer signed this, I think, before July 1st and Mr. Fisher, and then it was mailed out to me. I was not in the office and Mr. Fisher sent it out around the first of July, and it was sent back to him.

Q. How long was that agreement in that form lived up to by the parties? Was any change ever made in that agreement?

A. Only change of payment.

Q. Relating to what paragraph of that instrument? A. 5.

Q. Paragraph 5. What was the change made at that time in Paragraph 5 in the matter of payment?

A. The agreement by Mr. Brewer and myself on September 12th.

Q. What year? [58]

A. 1946, in the breakfast room. An agreement——

Q. Whereabouts? A. At his home.

Q. Whereabouts? A. In Portland, sir.

Q. Portland, Oregon? A. Yes.

Q. What was the agreement and why did you make it?

A. Our visit with them was very friendly. Of course, I guess that is immaterial. Mr. Brewer had a plan and that was an extension plan. He gave me a list of potential business that he could sign

(Testimony of Theodore C. Sibert.)

up and he expressed himself as to the cost of the signing up of new business, which is true.

In other words, he told me if he could afford it he could sign up enough monthly business to bring the present business up to \$3,000 monthly basis in Portland. Then he brought up the amount of money which he had drawn as a drawing account, and I expressed myself in this manner, that I appreciated a man that wanted to expand the business and I didn't want to make any hardship on him, and if he had taken so little home a month that I would match that dollar for dollar and that would give him a surplus to take care of this expansion of business which he said he had in mind.

That was merely a verbal agreement and that was supposed to be—We talked that we would go back from July 1st, [59] 1946, and end January 1st or December 31st.

Q. December 31st of what year?

A. 1946.

Q. You say that you expressed yourself. Was that said to Mr. Brewer?

A. That always has been said.

Q. Was this said to Mr. Brewer?

A. It was said, yes.

Q. Did you, thereafter, go on that basis for the period of time from July 1, 1946, to December 31, 1946?

A. We did.

Q. And it was on your personal responsibility that you did that?

(Testimony of Theodore C. Sibert.)

A. Yes—No, sir. I have to report to the Board.

Q. Did you do so? A. I did, sir.

Q. When? A. In December.

Q. This occurred when; this conversation with Brewer occurred when? A. September 12th.

Q. And you reported it to the Board in December? A. In December.

Q. Why didn't you do it before?

A. It slipped my mind.

Q. When you did report, to whom did you report? [60]

A. To Mr. Fisher and Mr. Hilts.

Q. Was it satisfactory? A. It was.

Q. Now, there is a claim on the record by Mr. Brewer that this adjustment was on the basis of a division of the profits. Was that agreement ever made? A. Never.

Q. He claims it was made about Thanksgiving time in November—November, 1946. Was any agreement of that kind made in November, about Thanksgiving time in November, 1946, or at any other time? A. No, sir, there wasn't.

Q. Did you see Mr. Brewer in November?

A. I did, sir.

Q. Where?

A. He come down from Portland to visit and to relax, he said.

Q. Where did you see him?

A. At my home.

Q. Anyone with him? A. His wife.

(Testimony of Theodore C. Sibert.)

Q. How long did they stay at your home in November? A. Ten days.

Q. Was there any feeling—Or, what was the attitude between you and the Brewers, your family and the Brewer family at that time?

A. Very close, sir. We had a good time; no disturbance whatever. [61]

Q. Was there any mention of business?

A. Oh, no, no mention much of business; just expansion and, of course, there was talk at that time about certain men he had in his employ, but that is all, little short talks.

Q. He states in one place that he went to the office and complained to you that he could not get along on the basis that you allocated to him. Was there any such a thing as that? A. No, sir.

Q. Did he come to the office at all?

A. He did, for a little while.

Q. For what purpose?

A. To pick up chemicals to bring back.

Q. After you talked to Mr. Brewer in November, when did you again see him?

A. January 20th.

Q. What year? A. 1947.

Q. Where?

A. In the office, at Portland, and also at his home.

Q. Did you stay at his home then?

A. Yes, that night I stayed at his home.

Q. Was there anything said or done in connection with either the agreement—By the “agree-

(Testimony of Theodore C. Sibert.)

ment" I mean the franchise—as of July 1st or the dollar-home dollar-company agreement of September 12th, 1946? [62]

A. It wasn't mentioned, sir.

Q. What, if anything, relating to this business did you discuss on January 20th?

A. Mr. Brewer expressed himself about the Eastern Oregon run. He had the complete total of miles, the cost of operation, the long distances between stops, so to speak, and expressed himself that it was costing a lot of money to run the Eastern Oregon run. He asked me what we could do about it and we went into a separate deal. He needed help; he was up here by himself; he needed help to come in and help him, so I agreed that I would go back to Oakland and would send the accounts that we had in Eastern Oregon and I would take a salesman and a company serviceman——

Q. When you say "I", whom are you referring to? A. We.

Q. To your company?

A. I refer to our company.

Q. Yes. All right.

A. This would take a salesman and a company serviceman, and we were to run that Eastern Oregon run, take a whole month for it; we would start in the south and come up to Portland and take a whole month and work.

Q. Whereabouts in the south?

A. Start at Klamath Falls.

Q. Yes.

(Testimony of Theodore C. Sibert.)

A. And work right straight around the route, to build up a [63] route and then, if it wasn't built up in one month's time, to make the trip back, and then go back home to Portland. We agreed to the payments and the cost of this investigation; with the men on the payroll of Oakland we would continue to leave them on the payroll, and keep a separate and complete accounting of all costs, hotel bills and expenses and, at the end of the venture, if there was anything made in the venture, the Oakland office and the Portland office would divide that dollar for dollar. If there was anything lost, the Oakland office would take their dollar loss and the Portland office would take their dollar loss.

Q. When you say "Portland office", do you mean yourself or do you mean Mr. Brewer?

A. Brewer.

Q. When you speak of the Portland office you are referring to Brewer, the agent?

A. He was the agent.

Q. What was done in the matter of expenses and salaries of these men?

A. We paid all or most of the salaries. There was a little that Mr. Brewer paid, but we paid practically all the salaries and expenses.

Q. What was the agreement with respect to salaries and expenses?

A. Well, we would make an accounting of it and we would pay the salaries of the men.

(Testimony of Theodore C. Sibert.)

Q. You mean your company would pay the salaries? [64]

A. Yes. Our company would pay the salaries and expenses and finance the trip and divide the remuneration out of it and we would split the costs—we would split the remuneration or the loss.

Q. I will repeat this by way of summary to see if I have got you correctly. The expenses of this trip, including costs and salaries, were to be divided equally between Brewer and your company?

A. Yes.

Q. If there was a loss, it was so shared, is that right?

A. Yes.

Q. And if there was a profit, it was so shared?

A. Yes.

Q. Do you know how it turned out, whether there was a loss or a profit?

A. There was a loss.

Q. Has Mr. Brewer ever paid any portion of that?

A. No, sir.

Q. I presume you went ahead and carried out this separate agreement that you have described? That was done by the parties, was it?

A. Yes.

Q. Whom did you send out from the Oakland office?

A. DeGrey Brooks and Jack Ahern.

Q. When, after January 20, 1947, did you again see Mr. Brewer? [65]

A. When did I, after the January trip?

Q. Yes. A. March 29th.

Q. What was the occasion then?

A. Our regular trip up here.

(Testimony of Theodore C. Sibert.)

Q. Anything said or done at that time in relation to this business that bears on this case, that you can recall?

A. You mean our agreement of September 12th?

Q. Was that discussed then? A. No, sir.

Q. Did your discussion at that time bear on any matters here at all? A. No, sir.

Q. What did you discuss, generally?

A. Just things in general.

Q. When, after March, did you again see Mr. Brewer? A. June 22nd.

Q. Where? A. June 17th. Correction.

Q. Where? A. In Portland, Oregon.

Q. Who was present?

A. Mr. Hilts, myself and Mr. Brewer.

Q. Who is Mr. Hilts?

A. One of our associates, our auditor. [66]

Q. What was discussed at that time with Mr. Brewer present?

A. Things in general was discussed. There was two or three outstanding things. Mr. Hilts made the audit of the books and then we made a budget, which I always had when I came in it, to find out how much business I done and how much it cost and, naturally, being president of this concern, I like to see everybody make a profit.

Q. Go ahead.

A. Mr. Brewer, Mr. Hilts and myself went over his books. We took a recap of the cost of each man that he had working for him, the payroll, the expenses, the car allowance, also the rent, telephone

(Testimony of Theodore C. Sibert.)

charges, advertising, his expenses, and allowed \$150 for an office girl.

We deducted that from the amount of business done in May, added 20 per cent as of the 80-20 agreement, and it came out that Mr. Brewer's part would be \$855.

Everything was very congenial. Mr. Brewer expressed himself that he couldn't afford to stay on the dollar-for-dollar agreement.

Q. Why?

A. Because the budget showed that he could make more money on the 80-20 agreement, as in the franchise.

Q. Was there any \$3,000 figure in there?

A. Well, that had ended my verbal agreement as of September 12th, although I didn't bring that up or didn't bother him. Mr. Brewer's [67] agreement was that if we would match the few dollars he would take home he could have the business built up by the first of the year, up to \$3,000, and it never occurred, but that was the basis. It showed a balance—it showed that Mr. Brewer had done \$3,000.

Q. When did that show?

A. The last of May.

Q. 1947? A. 1947, yes.

Q. Was that taken into consideration in your budget?

A. Yes. That wasn't in our verbal agreement, although I didn't press anything.

(Testimony of Theodore C. Sibert.)

Q. Do you mean that the verbal agreement of September 12, 1946, ran clear through to May?

A. The agreement——

Q. Did it or didn't it run clear through to May?

A. We allowed it to run clear through to May.

Q. When did you make that agreement? In other words, I don't think you understand me. When you made the agreement of September 12, 1946, did that agreement run clear through to May of 1947? A. No.

Q. When did it run to?

A. It ran from July 1, 1946, to January, or December 31, 1946.

Q. What did you mean by saying that the verbal agreement was [68] taken cognizance of?

A. As I remember our agreement, Mr. Brewer went back on the 80-20 in January or possibly February.

Q. That does not answer my question. What bearing did it have on May, 1947?

A. May, 1947, we, ourselves, because of this Eastern Oregon expense and loss, put the Portland office back on the dollar-for-dollar.

Q. When did you do that? A. May 15th.

Q. Did you see Brewer at that time?

A. No, sir.

Q. By whom was that agreed to?

A. In conference with Mr. Hilts and myself.

Q. Was Mr. Brewer present? A. No, sir.

(Testimony of Theodore C. Sibert.)

Q. Was it at his solicitation? A. No, sir.

Q. How was he notified of it?

A. By letter.

Q. What was the date of that letter?

A. May 15th.

Q. March 15th, isn't it?

A. March 15th. As I recollect, March 15th.

Q. March 15th? [69] A. Yes.

Q. When you have been saying "May" all the way through, that was in error?

A. That is right, Counsel.

Q. I want you to refer to Exhibit No. 29 and ascertain if that is the letter you have reference to?

A. It is.

Q. What is the date of that letter?

A. March 15, 1947.

Q. Do you wish to correct your testimony to conform to March rather than May?

A. I was confused. I wish to correct my testimony.

Q. Going back to this conference in June, state what you did with respect to the adjustment, if any, of profits over the period from January 1st to June 30, 1947?

A. Mr. Hilts had been north and had received word that the Eastern Oregon venture, which I mentioned before, that separate deal, was getting bad; he had got reports from Mr. Brewer, so we had a meeting, and Mr. Hilts had not very definitely understood the deal that Brewer and we made; he heard about it but he didn't understand

(Testimony of Theodore C. Sibert.)

it. That was the first meeting we had had with Mr. Hilts; he had been out of town and it was the first time we had gotten together for quite awhile.

We figured, as to Eastern Oregon at the time, on putting in this new work to make the Eastern Oregon district pay, [71] that it would be nice to show Brewer that we were not a company that would demand everything, you know, but would help him and cooperate with him, so we, ourselves; although he had paid his January and February franchise on the 80-20 basis, as per agreement, we thought it would be nice to show that we were trying to work with him and not take advantage of him, and that we would go back on the dollar-per-dollar agreement, and that is what we tried to explain in this letter.

Q. What letter are you referring to?

A. Exhibit 29, your Exhibit 29.

Q. That is the March 15th letter?

A. The March 15th letter.

Q. All you have said has been relating to a matter in March, 1947? A. Yes.

Q. What my question asked for was in June.

A. Oh.

Q. I think you still have the dates and the times confused, Mr. Sibert. A. I am sorry.

Q. It is all right. As I understand, all you have said shows why you wrote the letter, why the letter of March 15th was written by Hilts to Brewer?

A. Yes.

(Testimony of Theodore C. Sibert.)

Q. Calling your attention to June of 1947, not March but June—— [71] A. Yes.

Q. Did you have an accounting with Mr. Brewer in June? A. Yes.

Q. Who was present?

A. Mr. Hilts, myself and Mr. Brewer.

Q. Did Mr. Hilts compile a statement at that time of the financial obligations between Brewer and the company? A. Yes.

Q. Do you know whether or not it was discussed with Mr. Brewer? A. It was.

Q. Do you know whether or not it was agreed to by Mr. Brewer? It was.

Q. How do you know? A. I was there.

Q. Any other reason?

A. Well, I was there and heard it, and that was the time we made the budget that I was talking about.

Q. Did Mr. Brewer make any payment at that time? A. No. We asked for it.

The Court: Recess until one-thirty.

(Recess to one-thirty p.m.) [72]

(Court reconvened at one-thirty o'clock p.m., January 20, 1948.)

Direct Examination

(Continued)

By Mr. Rankin:

Q. I think when we closed our morning session, Mr. Sibert, I was directing your attention to June 20th, the conversation between Mr. Hilts, Mr.

(Testimony of Theodore C. Sibert.)

Brewer and yourself, and you had testified concerning the March 15th arrangement.

Now, again directing your attention to June 20th—I have called it June 20th; I think the exhibit was dated June 20th; but when was your visit here?

A. I came up on June 17th.

Q. You came up here on June 17th?

A. Yes.

Q. Whenever we designate that conference, whether it was June 17th or 20th, we are talking about the time when you, Hilts and Brewer conferred on the amount that was due to Paramount from Brewer. A. That is, 1947?

Q. June 17th to 20th, 1947. A. Yes.

Q. So that we will have this clear, it is not related to the March conference. Will you state where you met in this June 17th conference?

A. In the Paramount Pest Control office of Portland. [73]

Q. Where is that office located?

A. Southwest Park.

Q. Was there an office there before Mr. Brewer took charge? A. Our office down there, yes.

Q. Where was that?

A. In Mr. Taylor's home.

Q. In this June 17th conference, who was present? A. Mr. Hilts, myself and Mr. Brewer.

Q. What was discussed in relation to this business at that time?

A. There was a recap made of his business, a recap made of his business, as of May, the end of

(Testimony of Theodore C. Sibert.)

May. Mr. Hilts took the figures off the books, and then we three made a recap, a budget—we took the wages of each man, took the expenses, the chemicals used, gasoline, auto expense, rent, advertising, phone, all things pertaining to the business, as far as costs was concerned. Then we took 20 per cent of the gross business done, deducted that from the business in May and there was \$855 left for Mr. Brewer.

Q. How much did you get?

A. Six hundred—20 per cent.

Q. You do not mean 20 per cent of \$855? \$855 and \$600 made a total of so much. Is that what you mean, something like that? A. No.

Q. Tell me this: Did Mr. Hilts, as your auditor, make a detailed accounting? [74]

A. This budget, you mean? That was done by Mr. Hilts, myself and Mr. Brewer.

Q. Then was there a statement made as to how much Mr. Brewer owed the company?

A. There was.

Q. Who compiled that statement?

A. Mr. Hilts and Mr. Brewer.

Q. What was the nature of the conversation as to whether or not it was friendly or disagreeable, in any feature? A. It was very friendly.

Q. Did Mr. Brewer have any criticism or objection to anything that was done by the company?

A. No; very friendly.

Q. The record shows that he claims to have told you at that time that unless you carried on with

(Testimony of Theodore C. Sibert.)

the contract he had in mind, he was going—he was quitting you. Was anything said by Mr. Brewer about his leaving Paramount Pest Control Service?

A. Nothing whatsoever.

Q. You say in your testimony that the relationship was friendly. On what do you base that statement?

A. Well, when we made this budget, we agreed at that time to extend the dollar-for-dollar deal to the end of the fiscal year.

Q. That was when?

A. That would have been June 30th, and then go back on the [75] regular franchise, which was the 80-20 payment.

Q. Did Mr. Brewer know that?

A. This was his suggestion.

Q. How do you mean it was his suggestion?

A. Well, he stated that he could make more money according to the budget on the 80-20 payment than he could on the dollar-for-dollar.

Q. Could he?

A. Yes. It, I think, was understood.

Q. Will you state whether or not that was understood, that he wanted to go back on the franchise?

A. It was understood.

Q. Was there anything in your relations, other than what you have described, that disclosed their friendliness?

A. Well, Mrs. Brewer was down south. She left before I arrived in Portland. It was his little girl's birthday, and I suggested, before I left Seat-

(Testimony of Theodore C. Sibert.)

tle, that if we could get plane reservations, that he and the little girl go back with me as our guests for the little girl's birthday present.

When we got to Seattle—We tried to get reservations in Portland. They were received in Seattle. I called him from Seattle and told him I had the reservations and was going to Spokane, and I got his reservation and the little girl's reservation and made a reservation on the same plane. The plane stopped in Portland. I got off, got his tickets, and we went [76] to San Francisco.

Q. Did the little girl go with you?

A. She did.

Q. Did you meet Mrs. Brewer or not?

A. Mrs. Brewer, her sister and my wife met us at the airport in San Francisco.

Q. Where did they stay?

A. They went home that night with Mrs. Brewers' sister and then came over to my place.

Q. Where? A. In Oakland.

Q. How long did they stay there?

A. Four days—five days.

Q. Was anything said that seemed to disturb the friendship during that period?

A. We left very good friends.

Q. Was any suggestion made at that time in connection with any of the business that he had been doing here?

A. Everything seemed to be very fine and cordial and everything was good.

(Testimony of Theodore C. Sibert.)

Q. I have reference particularly to what I understood was some question about collections.

A. Oh, yes. Mr. Hilts notified me over the phone there were a lot of accounts receivable.

Q. Did you take that up? [77]

A. Oh, I spoke to them about it.

Q. State what their attitude was?

A. There was no attitude, so much, to me. Mrs. Brewer seemed to have gotten mad over something. I don't know that it was over that or what it was, but it was nothing, as far as we were concerned.

Q. When did you again see or hear from Mr. Brewer?

A. I saw Mr. Brewer in the hotel room next after he had sent in his letter that he was quitting, in August.

Q. You say he sent in a letter? A. Yes.

Q. Refer, in those exhibits you have there, to Exhibit No. 42. I will ask you if that is the letter to which you have reference. It is in the file here. I will ask you if that is the letter to which you have reference?

A. Yes, this is the letter of June 24th.

Q. July, isn't it? A. July 24th, yes.

Mr. Rankin: Your Honor, this letter is pleaded in the pleadings. I shall not take the time to read it.

Q. I note a provision of the franchise in which there is a 90-day provision for terminating it. Is that the letter upon which the termination was based? A. It is not.

Q. What was the termination? [78]

(Testimony of Theodore C. Sibert.)

A. This is the letter upon which the termination was based, yes.

Q. That is what I mean, but not in compliance with the contract?

A. It was not in compliance with the contract.

Q. When did you receive that letter?

A. This letter came into my office June 26th. It was written June 24th.

Q. It shows on its face it is July.

A. I mean July. I am sorry. July.

Q. Had there been anything, up to the date of the reception of that letter, in July, 1947, that indicated to you that Mr. Brewer was dissatisfied with his association with Paramount Pest Control Service?

A. Nothing whatever. It was just the reverse. He always said he had the best business in Paramount Pest Control Service, always bragged on it, and was very satisfied.

Q. Had there been anything indicating a dissatisfaction on Mrs. Brewer's part prior to the time of the reception of that letter?

A. Nothing that I know of, sir.

Q. Did she ever tell you anything that she was dissatisfied about?

A. Just a few different things, which I paid no attention to.

Q. Anything about the compensation her husband was receiving?

A. Nothing. I never talked those things over, only with the parties involved. [79]

(Testimony of Theodore C. Sibert.)

Q. What did you do when you received this letter? A. I was on my vacation.

Q. Did the Brewers know you were going on a vacation? A. They did.

Q. How did they know that?

A. It was talked about when they were at my house, as my house guests.

Q. When did you go on your vacation?

A. Well, let's see——

Q. Where, first, did you go on your vacation?

A. Up to Strawberry to build a cabin, with my wife.

Q. Where is Strawberry?

A. In California.

Q. Were you there when this letter was received?

A. I was up on my vacation, yes sir.

Q. What did you do when you got this letter?

A. I immediately came into Oakland and then came up here.

Q. What did you do while you were here?

A. I called Charlie up and asked him to come and release the chemicals and equipment which he had. He came up to my room. He had refused to do that heretofore. He came up to my room and said he would release them.

Q. Did he then give you any explanation as to this letter or any reason for his termination?

A. His explanation was only one, that he had to do it on account [80] of his family.

(Testimony of Theodore C. Sibert.)

Q. Did he say why he had to do it on account of his family? A. He did not.

Q. Generally speaking, without going into detail, did you find then that there was any solicitation by Brewer, from your investigation and service with the company, of any of the patrons that had theretofore been patrons of Paramount Pest Control Service?

Mr. Bernard: Object to that as calling for hearsay testimony.

The Court: He may answer.

A. I sure did.

Q. (By Mr. Rankin): Did you find that there had been some solicitation?

A. Everywhere our boys went they found that trouble.

Q. Now, a few questions that I think possibly I overlooked as I ran through this hurriedly. Did you expend any money in the organization of this business?

A. I have, lots of money.

Q. Can you give the Court any idea of how much and on what phases of it you expended this money?

A. You mean the business in Portland?

Q. No. I mean the business in general, first, and then in Portland.

A. Yes. We take a certain amount of our profits to experiment with—— [81]

Q. Just a moment, Mr. Sibert. Let us go back to the beginning. I realize it is going back to what

(Testimony of Theodore C. Sibert.)

you testified to, to some extent, this morning, but when you formed this business, you and Fisher, as a partnership, did you expend any money then?

A. We expended everything we made into establishing this business, every effort—That took all we had.

Q. Was that the original expenditure—I mean, was the original expenditure all that you had put in?

A. Oh, we put everything that we had in the world into this business.

Q. But, subsequent to its origin, state whether or not you still made expenditures in behalf of it?

A. We did continue to do that. We spent money for education, for experimental work, and for getting the best chemicals to apply to these specific insects that will work the best for us.

Q. I don't think I asked you anything about Duncan. When did Duncan come into your employ?

A. In 1942.

Q. And what did he do?

A. He was a serviceman for quite a few years and he was very adaptable to teaching field men, to break in servicemen, show them the correct way to distribute the poisons, and to mix the inert ingredients in certain poisons and place them in a safe place—in containers and so forth, that is necessary to keep from contaminating foodstuffs and injuring carpets, varnishes [82] on floors and so forth.

Q. Was he a very good man in your employ?

A. Duncan was a very fine employee.

(Testimony of Theodore C. Sibert.)

Q. I think you testified this morning you sent him up here to instruct Brewer. Did he continue to remain in the employ of the company after you sent him up here? A. Yes.

Q. When did he terminate his services, as far as you know, with Brewer? That would be August 1st, 1947? A. Yes.

Q. Have you tried to get service upon him in this case? A. I have, sir.

Q. Do you know Merriott?

A. Not personally. He was hired— I don't know Merriott personally.

Q. Did Mr. Brewer ever ask you for permission to hire Merriott? A. No, sir.

Q. Is that a desirable feature of your contract, that you ask the agent to tell you whom and when he employs men? A. The contract——

Q. Is it a desirable feature of your contract?

A. No, it isn't.

Q. You don't understand my question.

A. I am sorry.

Q. What? [83]

A. It is desirable. I know what you mean now. It is a desirable feature of our contract.

Q. Why?

A. Because we know we have more experience in hiring men than these men do out here, and it is in our contract that we desire to help hire their men, and we reserve the right to eliminate them from the service at any time.

(Testimony of Theodore C. Sibert.)

Q. State whether or not they have a responsible position in the performance of work in connection with poisons? A. That is true.

Q. How much of the information as to these formulas and methods of application and so forth did you give to your employees?

A. All that is necessary, so that they can do their work in an efficient professional way.

Q. Did you give them the detail of the composition of any of your formulas and poisons?

A. You mean the formulation of the formulas themselves?

Q. Yes.

A. Only to the extent where they must insert the inert ingredients.

Q. Did you ever know, in connection with Mr. Rightmire, Mr. Duncan or Mr. Merriott, that they were leaving your employ prior to the time that they went with Mr. Brewer?

A. I knew nothing. It was a big surprise.

Q. They never notified you, either verbally or in writing? [84] A. No, they didn't.

Q. Did they ever personally give you any explanation why they left you?

A. They did not.

Q. Did you, at the time you came up here, ask for and secure an inventory from Mr. Brewer of whatever he had that you were entitled to purchase under your franchise? A. I did.

Q. Did you get the inventory?

A. After I got here, we got the inventory.

(Testimony of Theodore C. Sibert.)

Q. Did you get delivery of all materials that you found by that inventory you had a right to purchase?

A. We got delivery of what was in the warehouse.

Q. Were there other materials that you did not get delivery of? A. Yes.

Q. This letter that is in evidence as terminating his association mentions that he might want some of these things "in the future." Do you know what he had reference to when he states he might want those things "in the future"?

A. I did not.

Q. With respect to his living up to his contract, were there any features that you recall that he did not perform which, under your operation of the company, he was required to do? For example, let me expedite this so as not to take too much time in your consideration. [85]

The contract provides, Paragraph 4, Page 2 of the contract, that he will take all contracts in the name of the company. I mean, take contracts in the name of Paramount Pest Control Service?

A. Yes.

Q. Will you turn to Exhibit No. 40-A.

A. I have it, sir, 40-B. Just a minute. 40-A.

Q. Is that supposed to be in the name of Paramount Pest Control Service?

A. 40-A is an expense account.

Q. Let me see it. May I see it, please? I probably have the wrong number here, apparently. Yes,

(Testimony of Theodore C. Sibert.)

that is the wrong number. There are two 40-A's apparently.

What I have reference to is this Indenture of Lease, "Made this 1st day of November, 1946, by and between The House of Celsi, an Oregon partnership, hereinafter called the Lessor, and C. P. Brewer, doing business as the Paramount Pest Control Service, 519 N. W. Park Avenue, hereinafter called the Lessee."

First, how do you indicate whether you have serviced a particular place or not?

A. We have a card that we hang up.

Q. Is that the card?

A. That is our card.

Q. It reads: "To Our Patrons. We have Paramount Sanitary System. An assurance of cleanliness." [86]

Did Mr. Brewer put out a similar card when servicing patrons? A. He did.

Q. Is this the card?

A. This is the card.

Mr. Bernard: Have you got an exhibit number on that?

Mr. Rankin: Yes, just a moment. It is 40-A. There are two 40-A's.

Mr. Bernard: That is all right. That is close enough.

Mr. Rankin: I also want to offer in evidence, your Honor, a bill of sale. No, that has been offered—I am sorry. But I do want to call this to your particular attention because it is the one Mr.

(Testimony of Theodore C. Sibert.)

Sibert signed afterwards. Do you gentlemen have any particular objection to this because of that fact?

Mr. Bernard: No.

Mr. Rankin: Thank you. You may cross-examine.

Cross-Examination

By Mr. Bernard:

Q. This partnership, you say, was formed in 1937, was it? A. No, sir.

Q. What year? A. 1938.

Q. Had you been in the pest control business prior to that time? A. I had. [87]

Q. What other work—

A. I want to answer that exactly right. I had been in business, but not for myself before.

Q. What other business were you doing at that time?

A. I am a general contractor, building superintendent, carpenter work, cement work, plaster work.

Q. How long did you continue those occupations after 1938?

A. I never continued those only in my own work.

Q. Did you continue in those occupations?

A. Only in our work. When we first started, I worked at carpenter work.

Q. How long did you continue in those occupations after 1938?

(Testimony of Theodore C. Sibert.)

A. You see, sir, those occupations is in our business. We do termite work. We are still continuing carpenter work, cement work and plaster work.

Q. What other business was Fisher in at the time the partnership was organized?

A. He was in the extermination business.

Q. Where was your place of business when Brewer went to work for you?

A. This is '38. The head office was 638 Sixteenth Street.

Q. Where? A. Oakland.

Q. How big a place did you have?

A. We owned our own building—we own our own building and [88] have quite a space.

Q. How big a place?

A. I don't know the exact size of the building.

Q. What date was it Brewer came to work for you?

A. July 4th, according to our records. February 4th; sorry, February 4th.

Q. February 4th? A. 1947.

Q. What date did he come to Portland?

A. Around the first of April.

Q. You have referred to certain labels which are in evidence here. Those labels are put on the cans of poisons or preparations, aren't they? These labels that you referred to in your evidence are put on the cans of poisons or preparations?

A. Yes, sir.

(Testimony of Theodore C. Sibert.)

Q. Those labels contain the ingredients, do they?

A. Those labels contain the ingredients that are in the cans.

Q. So anybody that got hold of one of the cans could see what the ingredients are?

A. That is right.

Q. You say you do not put on the label the inert ingredients?

A. I did not. Some labels you do and some labels you don't, but the inert ingredients, they have to be in there.

Q. What is there that is secret about these concoctions or formulas that you give your salesmen to use or the other men [89] who work for you to use? What is there secret about it?

A. You understand, Mr. Bernard, the contents of the label is merely the quantity to the gram. That is on the label on the package. That is the law. The secret is the formula in which they are melted or mixed together to get a certain product to do a certain job and to kill a certain type of insect.

Q. That is the secret part of it?

A. That is the secret part of it.

Q. Did you or your company ever, at any time, furnish any of this secret information to Mr. Brewer?

A. Yes, sir.

Q. When?

A. From the time he started out to work for us. There is a certain portion of that he has to learn.

(Testimony of Theodore C. Sibert.)

Q. You mean to say you furnished Mr. Brewer any information as to how to concoct any of these formulas?

A. You misunderstand—That question can be answered Yes and No. There is certain chemicals that we concoct—You say “concoct”—We formulate certain chemicals with inert ingredients that is put out on the job. We have to show him how to do that.

Q. Describe what you mean by “inert ingredients.”

A. The inert is the volume of matter or liquids that is in the poison.

Q. I see. What do they usually contain?

A. In rat bait it is any type of stuff that will—You might [90] say, apples, carrots and so on, any type of bait—different types. In liquids it is—

Q. What is there secret about that?

A. So much of this is put in a certain formula to get a certain strength and so it could be attractive to a certain type of animal or insect.

Q. Can't that information be secured through other sources than yourself?

A. It might be, but not like Paramount gives it out.

Q. Who do you say gave Mr. Brewer this information? A. Mr. Duncan.

Q. Did you?

A. Not personally; some, yes.

(Testimony of Theodore C. Sibert.)

Q. What information did you give him?

A. I have been with Mr. Brewer on several jobs and showed him lots of things, and we talked—gave him information of my past experience. That is why I came to see him.

Q. You tell the Court what secret information you ever gave Mr. Brewer at any time about the formulas or concoctions that you put out for bait.

A. You mean one definite, special thing?

Q. Yes.

A. You want the time and place?

Q. I want the information, what it was. Tell the Court what secret information you ever gave this man. [91]

A. I gave Mr. Brewer secret information on fly or rat baits.

Q. Information?

A. What types of inert ingredients with a certain amount of active poisons to put out as certain types of rat baits to do a certain job, to kill certain animals or insects.

Q. Can that information be secured elsewhere?

A. He can't secure my experience elsewhere.

Q. Your experience, as a matter of fact, he can secure from other sources—how to put these inert ingredients in with the poisons in order to kill rats or insects? There are other sources that put out that information?

A. We are a service organization, not a sales organization, and our formulas and our advice is more profitable to anybody than something that somebody has made for sale, and information thereof.

(Testimony of Theodore C. Sibert.)

Q. Have you been as definite as you can as to any secret information or formulas that you gave Mr. Brewer?

A. Repeat that question. I don't understand, Mr. Bernard.

Q. Have you been as definite as you can as to any secret information or formulas that you ever gave Mr. Brewer?

A. I could have give him more secrets. I was definite in what he needed and what he could take at the time, and according to the situation thereof.

Q. How long did this instruction continue down there in California? [92]

A. Until all his time there, two months.

Q. What sort of work was he doing during those two months?

A. He was doing—he was going with Mr. Duncan to be broke in our service work.

Q. He had been doing service work?

A. In going with Mr. Carl Duncan, yes.

Q. He was in your employ in the laboratory that you speak about, wasn't he? A. No, sir.

Q. When he came up here, then, in April, it was with the idea of making him manager of the Oregon territory, was it?

A. That was our understanding, sir, before he went to work.

Q. After he had been employed by you for about six or seven weeks?

A. We had that understanding before he ever went to work. I was merely keeping my promise.

(Testimony of Theodore C. Sibert.)

Q. You figured that six or seven weeks' work as a serviceman rendered him capable of carrying out this tremendously important work of insect extermination in Oregon, as manager?

A. Sir, I did not.

Q. Why did you make him manager of the concern?

A. Because he was hired for this district and we sent somebody up here to help him.

Q. That was Mr. Duncan?

A. Mr. Hilts and Mr. Duncan, yes. [93]

Q. Did you come up at the time he was employed? A. Where, sir?

Q. Come up to Oregon?

A. I wasn't here when he came. I came up in April—He came the first of April with Mr. Hilts. He brought Mr. Hilts up. Mr. Fisher arrived here April 6th, Mr. Bernard.

Q. Where was the office of the Paramount Pest Control Service at that time?

A. I don't have the exact address but it was in Mr. Taylor's home. We had phone service—we had a phone there, and we had phone service on Taylor Street. I don't remember. I could look it up for you.

Q. Was Mr. Taylor the previous manager?

A. He was.

Q. And the headquarters of the concern were out at his home, is that what you say? A. No.

Q. Where were the headquarters?

(Testimony of Theodore C. Sibert.)

A. The headquarters office and those things was in the office on Taylor Street. He merely had the poisons and things like that at his home and kept some books at his home.

Q. The poisons and things of that kind were kept at his home?

A. Yes. He had a storeroom which we were renting there.

Q. Do you know about how long Mr. Hilts was here at that time? A. I do. [94]

Q. How long?

A. Mr. Hilts came up with Mr. Brewer and I came up the 23rd of April. We passed on the way, going back. I came up on the train. He left that day to go back to get his car to come back here.

Q. Did Brewer have to take an examination in California before he came up here?

A. He did not.

Q. Do I understand you to say from the time Brewer came here to the time he wrote this letter of resignation that you had no disagreement between yourselves at all, is that correct?

A. That is correct; the best of friends.

Q. You did, however, in response to Mr. Rankin's question, call attention to the fact that he took the lease in his own name and not in the name of Paramount?

A. I knew nothing of the lease, sir.

Q. You know it now?

A. I know it now, yes.

(Testimony of Theodore C. Sibert.)

Q. Did Paramount take out some insurance for him of any kind?

A. What type of insurance?

Q. Of any kind? Liability insurance?

A. We have a broker in Oakland that writes insurance for our office there and all of our business.

Q. Do you know how that insurance was written? A. Yes. [95]

Q. How was it written?

A. Paramount Pest Control Service, doing business as Brewer, I think.

Q. Wasn't it written Charles Brewer, doing business as Paramount Pest Control Service?

A. Maybe. I don't know. I never did see the policy, sir.

Q. Will you be as definite as you can, so we can cut the examination short? When and where was the first discussion had by you and Brewer, according to you, as to the change in the terms of this contract?

A. You mean the change of payment?

Q. Yes. A. September 12th.

Q. You say that took place in Portland?

A. Yes, in Portland, in Mr. Brewer's home.

Q. Brewer assigned as a reason for that change, what?

A. Mr. Brewer wanted to have an expansion of business, a program of putting on business, and the reason he assigned was this, that he had only

(Testimony of Theodore C. Sibert.)

taken so much money home, and asked me if I would go with him and help to finance the new business so that we could all profit thereof, and our agreement was: I said, "Charlie, I am not a big man, a big bad man, trying to take advantage of anybody. If you want to live cheap at home, I will take that same amount, up to that period of time, so that we can put this business on." [96]

Q. He thought he could make more money under that arrangement, didn't he, in the future?

A. Yes.

Q. You agreed to that?

A. I agreed for a change of payment, dollar-for-dollar payment. When Charlie would take a dollar home or if he took \$5 to live on, that is all I would take, and spend the rest in the expansion or building up new business.

Q. That was the agreement you made which you say you forgot to mention to the other men until December?

A. That is right.

Q. When was the next time that any question arose between you and Brewer as to the times of payment under this contract?

A. I didn't know there was a question, sir.

Q. When was it ever discussed between you after that, between Brewer and you, or you and Hilts?

A. We had a talk about that on the trip, June 17th.

(Testimony of Theodore C. Sibert.)

Q. How about this arrangement in March when this letter was written?

A. I didn't talk with Brewer. We just tried to show him the expenses that would be charged to him—it looked like there was going to be a charge to this district, and we wanted to show Mr. Brewer that we was still going the other mile.

Q. Do I understand, then, that this arrangement that was made in March was agreed upon by you and Hilts? [97]

A. It was. And he said in March, that was the first time it was exactly clear to him, and he thought it was a fine way to treat a company and a fellow in the field, and that was his idea. Hilts says, "Why don't you help Charlie," he said, "on this Eastern Oregon deal?" and I just consented; that is all.

Q. That was done without any previous communication between you and Brewer, is that a fact?

A. Myself and Brewer, yes.

Q. Do you know whether Hilts had talked with Brewer about it?

A. I didn't know. I wasn't here. I don't know.

Q. Did Hilts tell you whether he had or not?

A. He said Charlie had mentioned it to him.

Q. What did he say that Charlie had said?

A. Mr. Hilts is the auditor and he must have talked to Charlie about it to get, you know, a correct understanding of it, and he said Charlie merely mentioned it to him.

(Testimony of Theodore C. Sibert.)

Q. Did he tell you Charlie had objected when Hilts had presented a statement based on a 20-80 per cent beginning the first of January?

A. He did not.

Q. You say the first time you and Brewer had the matter up was in June?

A. The first time Mr. Brewer and I ever talked about anything like that except that one time was in June.

Q. You want the Court to understand that, although Mr. Brewer [98] had requested this change in 1946, although you and Hilts had agreed to continue the change in March, 1947, to help Brewer out, that Brewer told you, between the 17th and 20th days of June, that he wanted to come back on the 20-80 basis because he would make more money that way?

A. I do.

Q. You never had any idea to the contrary, that there was any trouble, until you received this letter which was written on July 25th?

A. I had no idea. I thought we were the best of friends and things were going to continue.

Q. Then, the letter of March 15th that Hilts sent out, that letter was sent by Hilts after his conversation with you, wasn't it?

A. It was, in the Oakland office.

Mr. Bernard: That is all.

Mr. Rankin: You are excused, Mr. Sibert.

(Witness excused.) [99]

E. W. BUSHING

was thereupon produced as a witness on behalf of plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rankin:

Q. Give your name to the Court.

A. E. W. Bushing.

Q. Where do you live, Mr. Bushing?

A. 1325 San Francisco Street, Vallejo, California.

Q. What is your occupation?

A. I am an entomologist.

Q. How long have you been such?

A. I graduated from the University of Illinois in 1942, with a degree from the School of Liberal Arts and Sciences—majored in entomology.

From that date until September I worked for the Dupont Experimental Station in Newark, Delaware, as entomologist, not for Dupont but for the Delaware Agricultural Experiment Station.

Q. Have you had practical experience in the field?

A. Yes. After working three months for that station in the practical application of insecticides, I went into the service for three years and a half.

Q. What did you do in the service?

A. Acted as entomologist in the service, in the United States for three years, spent three months in the Hawaiian Islands, and [100] all the time I was in the hospital, in the service.

(Testimony of E. W. Bushing.)

Q. The hospital service?

A. I was in the hospital, in the service.

Q. Oh, in the service? A. Yes.

Q. Did you work in the Dupont Experimental Station and in the Army, when you were not in the hospital—Was it related to your work as an entomologist?

A. Yes, it was. I was one of the fortunate individuals who went through the service in the bracket in which he had been trained at the university. My training in the university helped me in this respect in the service. I was responsible—If any of you are familiar with Army procedure, a sanitary officer is detailed on the basis of ten thousand personnel, and charged with the responsibility of the complete routine of rodent and insect control, in addition to other duties, and I was detailed on that basis here in the United States, and at Hickham Field, Hawaii, I was Chief Quarantine Officer on all incoming ships from the Orient.

Q. Have you worked with the Paramount Pest Control Service?

A. I am in their employ in July, 1946.

Q. Are you still in their employ? A. I am.

Q. As an entomologist, do you have anything to do with rodent control? [101]

A. Yes.

Q. The experience that you have described, does that relate to rodents as well as insects?

A. Yes.

(Testimony of E. W. Bushing.)

Q. In the Paramount Pest Control Service, do you have anything to do with the matter of poisons?

A. Yes, I am directly responsible for the formulation of all Paramount's formulas.

Q. Do you have anything to do in that service in connection with pests, insects or rodents?

A. Yes, from the standpoint of issuing explanations to all the personnel as to the uses of all these formulations.

Q. Do you have anything to do with the application, the means of bringing these poisons and these pests together?

A. Yes. We endeavor to supply our personnel with the best available equipment, going even as far as first experimenting and testing it there in the Oakland office before submitting it to them for their use.

Q. In the Paramount Pest Control Service, do you come in contact with any of the field operators or the men who are doing the practical work of controlling pests?

A. Yes, I do. I am at their service at any time that they so wish, in order to assist them at any time in their work, regardless of what their problems might be; they not being able to solve it, I would be more than willing to come out and travel [102] in the case of Portland or Seattle or whatever it might be to solve these problems for them, even to the extent that I would personally help them out with these problems.

Q. I would like to hand you the exhibits relating to poisons that have been identified by the president

(Testimony of E. W. Bushing.)

of the corporation, enumerated No. 5-1 to No. 5-26, and ask you to refer to them. You are familiar with those, are you not? A. Yes, I am.

Q. You have seen them in this form as they are presented here, before? A. Yes, I have.

Q. Mr. Bushing, it is the contention of these defendants that there is nothing unique about these poisons, that you can go out and buy them on the common market anyplace.

Will you take these exhibits, No. 5-1 to No. 5-26 and explain them. Explain what there is about them that this court should know in connection with the contentions made by the defendants. Refer to Exhibit 5-1, if you will, please.

A. 5-1, Paramount Ant Syrup.

Q. Is that on the common market?

A. There are many ant syrups on the market, yes, but not the Paramount Ant Syrup.

Q. What do you mean by that?

A. We have in the Paramount Ant Syrup incorporated an unusual inert ingredient. On the label we do not have to state what [103] those are, specifically. All that is necessary to state on the label is what the active ingredients are, those poisons which are defined in connection with the registration of economic poisons in the State of California.

As I have previously mentioned, there are others on the market, but we have incorporated into the inert portion of the product an ingredient which has made this more attractive, in our estimation, to ants.

(Testimony of E. W. Bushing.)

Q. In what particulars is it made attractive, more attractive?

A. We believe it is more attractive because, if the other syrups could be placed side by side, we think we have found through experience that they will prefer to accept ours.

Q. Just to clarify one thing: Those labels seem to be divided generally into inert and active ingredients.

A. Yes, sir.

Q. Active ingredients are what?

A. Those ingredients which are required to be specified on the label. They include those ingredients found in the list of economic poisons registered by the State of California.

Q. Inert ingredients are what?

A. Inert ingredients are only that part of the formula which may be either necessary to complete that formula or—When I say that it is necessary for them to be in there to complete the formula, I mean without that chemical existing in the inert ingredient, the ultimate product could never be gotten. [104]

Q. The next one, 5-2, what is that by name?

A. No. 5-2 is Paramount Bed Bug Spray.

Q. Is that on the common market?

A. No. Paramount Bed Bug Spray is not on the common market.

Q. Is there anything unique about this Paramount preparation?

A. This is a product in which we have incorporated a highly volatile solvent. The primary reason for this highly volatile solvent being present is that

(Testimony of E. W. Bushing.)

in spraying furs, clothes closets, et cetera, the high volatility permits very little damage to the fabrics.

Q. Take the next, 5-3.

A. Paramount Bed Bug Spray F2.

Q. Is that on the common market?

A. No, Paramount Bed Bug Spray F2 is not on the common market.

Q. There is bedbug spray that is on the common market?

A. There is, yes.

Q. How does this vary from the common market variety?

A. In this formulation we have developed a DDT percentage which, in our spray, does not leave undesirable residue as, for example, upon such things as furs, rugs, et cetera. I feel that this is a decided advantage. One of the larger railroads, for instance, objected to there being too much of a powdery residual on the fabrics from the use of excessive DDT.

Q. What is the next one?

A. Paramount DDT Barn Spray, F2. [105]

Q. Is that on the common market?

A. Yes, that is on the common market.

Q. Is that registered by Paramount?

A. We have registered that Paramount formulation because, included in the formula are the directions. Without directions the formula is no good. By that I mean, the raw substance has to be included with the application and proper directions are necessary.

(Testimony of E. W. Bushing.)

Q. What is the next number?

A. Fly spray F2.

Q. What is the exhibit number?

A. This is No. 5-5.

Q. Is that on the common market?

A. No, that is not. Paramount Fly Spray F2 is not on the common market.

Q. What is unique about that?

A. We have in this product, from our experience, added an increased amount of a particular solvent. That solvent is included in the active ingredients. Any material that will aid in the destruction of insects must be included in the active ingredients. That solvent aids in the dispersal of the DDT to the extent that this product differs greatly from others if for no other reason than the results.

Q. Just for the moment, this thought occurs to me: Suppose you had an active ingredient or suppose you had a formula that contained [106] elements A, B, C, and D, and you mixed them in that order; suppose, for the purpose of insecticide or rodent control, you mixed them A, D, C and B; would you have the same result?

A. No, you would not. If you would like, I can bring one of those——

Q. Does that appear later?

A. Yes, it does.

Q. Bear that in mind and call it to our attention when you come to it. Take No. 5-6, what is the name of that?

A. Paramount Fungus Solution.

(Testimony of E. W. Bushing.)

Q. Is that on the common market?

A. No, this particular product, Mr. Rankin, is not on the common market.

Q. Is it unique?

A. It is unique from the standpoint that there are very few, if any, people, individuals, who are acquainted with fungus. Consequently, there is no market demand for fungus solutions. Fungicides must be prepared according to the individual fungus. They cannot promiscuously be made to satisfy a general requirement. This particular product is used upon identification of a specific fungus.

Q. How is that fungus identified?

A. The fungi are identified under microscopic examination only. There is no prescribed examination that is adequate. To get down to a little more detail, the actual spores in the fungus [107] growth are identified,——

Q. That is, only by laboratory facilities could you make a proper analysis of a fungus?

A. You may be able to make it only to the extent of a generalized classification; you could not, to the extent of a complete identification.

Q. Take No. 5-7, what is the name of that?

A. Paramount Insect Powder.

Q. Is that on the common market?

A. No, Paramount Insect Powder is not on the common market.

Q. Is there anything comparable to it on the common market?

A. There is a product on the market, namely, sodium fluoride, which is an accepted roach powder.

(Testimony of E. W. Bushing.)

Q. Anything unique about this, in differentiation from the one you mentioned?

A. Through our long experiments in the business, over a period of years, we have acquired from various chemical houses, the possibility of securing an unusual product from this standpoint: In the manufacture of pyrethrins, which is incorporated in this formula, there is, falling off from the mill that grinds up a flower from Japan, a dust similar to what you have when you make coffee. That dust falls off and is collected and sold. However, that dust, being in such limited quantities, is only sold to those individuals or some concern with a priority, we will say, a priority that you get through long dealings. Consequently, [108] you have here 1.45 per cent pyrethrins. The usual percentage of pyrethrins on the market, instead of being 1.45 per cent, is only .9 per cent, so that almost again as much pyrethrin is actually contained in this product, and the results are double and the efficiency is tremendous.

Q. Has it a lethal quality or not?

A. It is highly lethal, a highly lethal quality, from the standpoint of an active ingredient. That is why we have incorporated pyrethrins into this product. Sodium fluoride in itself, as I just said a while ago, is an accepted roach powder. I do not deny that or that you can find sodium fluoride on the market anywhere. I am not contending that at all but, just as in coffee, there are those that are excellent and those that are very poor. An insecticide is no different.

(Testimony of E. W. Bushing.)

Q. The next exhibit, No. 5-8.

A. Paramount Insect Spray.

Q. Is that on the common market?

A. No, Paramount Insect Spray is not on the common market.

Q. What is unique about that?

A. That is one of those products I was referring to a minute ago, where you can mix it A, B, C and D——

Q. Please tell the court about it.

A. First of all, this is an exclusive formulation of ours. There is no other formulation like it available on the market.

In respect to this particular formulation, we had used [109] this for several years. During this last summer, in Mr. Brewer's territory, as well as in Washington and in our home state, we used this particular product exclusively.

For economic reasons we decided to give one of the very reputable oil companies in this state, here in Washington, and all over the United States, the opportunity of supplying us with a product that they claimed was comparable. This product is five per cent DDT, plus the necessary ingredients which are lethane, pyrethrin, plus carbon tetrachloride, plus a petroleum base.

They came to us and, naturally, from the standpoint of economy, we are interested in having this supplied to us, so for three months, June, July and August, we used this product.

(Testimony of E. W. Bushing.)

After three months' time we had so many complaints; in fact, we even had cancellations of contracts due to this product that this extremely large oil concern was putting on the market as being comparable; in fact, they were to such an extent that we pulled back their product from use and substituted our own.

Now, at the time that this occurred, this large oil firm was naturally interested in knowing why. Consequently, they came to us and asked for samples of our product to take them to their laboratory. Their explanation as to why ours is better need not be brought in here, except to this extent, that it was proven better. When we put them back in our service again, it completely eliminated all the complaints that we had [110] had.

Q. Take No. 5-9. What is the name of that?

The Court: How many are there? Twenty-six?

Mr. Rankin: There are twenty-six.

The Court: Don't go through every one of them.

Q. (By Mr. Rankin): Will you pick out some exceptional ones that you claim to be particularly unique and particularly lethal?

A. I have some here I would like to bring out——

Q. What is the first one, the exhibit number?

A. Exhibit No. 5-20, sodium fluoroacetate technical.

Q. Is it on the common market?

A. Not by any means, no. Sodium fluoroacetate is known to the general public as Compound 1080.

(Testimony of E. W. Bushing.)

This product is by no means available on the local market. It is not sold on the local market because the Monsanto Chemical Company, which manufactures and sells Compound 1080, sees to it that the companies that do buy it have a designated amount of insurance, namely forty and eighty. You must supply a certificate that you have that amount of insurance coverage. We have insurance coverage of not only that but one hundred thousand to two hundred thousand coverage.

It is unique in this respect: It is an extremely lethal poison. There is no antidote. In addition to the fact that there is no known antidote, it is usually sold only to those commercial companies that have satisfied these requirements.

Now, in attempting to use sodium fluoroacetate technical, [111] there has been much dissension from the public about its extreme potentialities. Nevertheless, it has a place in this industry and will continue to be used.

For the information of the Court, the Wild Life Service is one that is doing excellent work in furthering and advancing this product. One of my personal friends is in the Wild Life Service and has done much of that work.

Q. Do you know how many firms or companies are qualified to secure this?

A. I don't know offhand.

Q. What is the other product that you have there?

(Testimony of E. W. Bushing.)

A. I would like to bring this particular product up, primarily because I believe it shows what the secret is about the manufacture of formulas. In fact, I believe it is one example, even though it is more prominent, you might say, than others.

That is Paramount's Termite and Fungus Mixture, Exhibit 5-21. In the Termite and Fungus Mixture, there are at least six registered economic poisons, at least six. However, going into this formulation, there are at least eight. Immediately one begins to wonder, "Why aren't those two registered?" Those are the inert portions and, in the finished formulation, there is no trace.

I mean, in this respect, which our counsel was attempting to bring out: When you mix A, B, C and D, for instance, in this formulation, that is one thing. If you were to mix A, C, D [112] and B, it does not mean that you get the same results. The additional ingredients in here are caustic soda and sulphuric acid. Should this formulation fall into the hands of some other individual, it would be totally impossible for him to totally remix the formulation, because in it there is no indication that there is caustic soda and sulphuric acid so, consequently, if he made the attempt, taking what was available on the label, the product would by no means compare in efficiency or, in fact, do the job that it was originally intended for.

Q. That is sufficient on the matter of poisons. About the pests, are you familiar with the various pests sought to be controlled by this service?

(Testimony of E. W. Bushing.)

A. There are continually developing in this field additional pests beyond those that were originally fought. By that I mean that has mostly come about as a result of the last war.

Those pests that we are concerned with are referred to in California as structural pests. Those pests are those most commonly found in homes, warehouses, theaters and so forth, and would include such things as bedbugs, ants, fleas, ticks, rodents, rats and mice, such things as those which are referred to in the structural business,—referred to as structural pests, I should say.

Q. Are there any that are becoming unusual or new in the field?

A. Yes. We have many forms of bedbugs being introduced into this country from the Orient. Of course, when one says "bedbugs," [113] the natural opinion is that they can be controlled by some product that we had before. That is not so by any means. Our specific pest, not just "bedbug" but by its Latinized name must be controlled by, we will say, a Latinized formula.

Q. Does it require any knowledge, any classification of a particular pest in order to most effectively determine its control?

A. Oh, yes. One of the best examples I can think of offhand is what is known as the common fruit fly. Unless you identify it specifically, as to the exact species, you can spray until you are blue in the face and you won't control them. By that I mean that Chlordane is the accepted control for one species of

(Testimony of E. W. Bushing.)

this fruit fly, and DDT as the control for another one. For instance, if you use DDT on one to control it and use DDT on the other, you are not going to have any results at all.

Q. Coming to the third classification, or the application of poisons to the pests, is there anything that is required, any particular knowledge or training, in regard to that?

A. Before the war it was assumed that one material, for instance, could be made and accepted for the control of all pests. That was the assumed theory and it was one that was practiced extensively.

After the war, with new ideas on organic chemicals, it was found, instead of having one product that a man was going to do this with he had to have twelve products to control twelve different insects, not that some of these products would not be [114] controlled to a minor degree. Wherever he had a job, it was suggested to this customer that it was efficient that he use only that compound specifically developed for that insect and that insect only.

If you would like for me to just give you an example: Chlordane is one of the latest products on the market. That product was put on the market just about, at least, two years ago and was slow in being used. When it first came out, it was thought it would be available to do a lot of things and was going to replace DDT, and was good for everything. In my estimation, Chlordane is good for only three insects and DDT for approximately two.

(Testimony of E. W. Bushing.)

The Court: What do you mean, "approximately two"?

A. It is used against many others with incomplete results, as you get if you use another product.

Q. (By Mr. Rankin): In the application of the poison to the insect, is there such a differentiation as killing an insect, in one instance, or having it spread, continue to spread to other insects or rodents? Is there such a differentiation?

A. You are speaking about the chemical now?

Q. Yes.

A. If I understand, you are. This is my explanation——

Q. Yes.

A. In spraying for control of various pests DDT is known not as an agent that kills upon mass dispersal but as an agent that [115] kills after it has been deposited upon a wall, for instance. The ordinary housewife, when she gets one of these bottles that has a 5-per cent DDT, returns home and disperses it around the room, but in using DDT it is essential, as it is with other products, to put the material exactly where you want it to do the job and nowhere else, not in midair where it can be of no value.

Q. Did you describe what you do, if anything, in the matter of training people to go in the field?

A. No.

Q. Will you give a brief explanation to the Court of what you do in that regard?

A. We have attempted, to the best of our ability, to train all of our personnel, either through direct

(Testimony of E. W. Bushing.)

contact, my direct contact with them, or through the dissemination of information by letter, folder, et cetera.

We have gone beyond that. We have requested them to collect any specimens they were confronted with that they didn't know about and forward them back to me, thinking that perhaps maybe they would collect something that they had never heard about and would be interested in knowing something about it. We have encouraged this tremendously. We have informed them as to the best technique of collecting these specimens and forwarding them to the Oakland office, making it plain to them that nothing could be forwarded alive through the mails—— [116]

That is a Federal regulation.

Now, to encourage them more to forward in their specimens was always at the tip of my tongue when I was out because the unfortunate thing that I was confronted with was that the average individual out in the field, while he could describe it partially, he could not describe it completely enough so I could recommend control measures. That was the reason for the specimens and that was the reason for disseminating this information that kept them abreast of all current changes in chemicals, as much as possible.

In particular, this fact: We don't want them necessarily to have information about a chemical in a scanty way only. One could do more harm by getting limited information about chemicals than you can do good. After all, it was up to us in the Oak-

(Testimony of E. W. Bushing.)

land office, and my department in particular, to choose those materials that would be used and those that would be used only in the control of each specific pest.

Q. To bring this down to the present situation, did Mr. Brewer himself ever make any application to you for information?

A. Yes, he received his training during the latter end—I can't give you the exact date. It must have been during the summer, but I received a letter in which he asked me——

Q. Was he still in the employ of Paramount?

A. Yes, he was. ——a letter in which he asked me to identify—— [117]

Mr. Bernard: I think the letter would be the best evidence. A. Pardon?

Mr. Bernard: I am making an objection.

The Court: Do you have the letter?

Mr. Rankin: I do not believe we have it.

Q. Just state in general terms what the inquiry was, if you will, and what you did in connection with it.

Mr. Bernard: I renew the objection.

The Court: He does not have the letter, he says.

Q. (By Mr. Rankin): Where is the letter, Mr. Bushing?

A. I have it in my folder in the hotel room.

Mr. Rankin: All right. I will call you back later. You may cross-examine. We will be able to produce the letter later.

(Testimony of E. W. Bushing.)

Cross-Examination

By Mr. Bernard:

Q. When did you first meet Mr. Brewer?

A. That date I don't remember exactly, sir. I would say roughly a year ago.

Q. How often did you meet him during the year?

A. I met Mr. Brewer only when he came down to the Oakland office.

Q. Once? A. At least once, yes.

Q. Where did you meet him at that time?

A. In the office; in the Oakland office.

Q. Did you give him any technical information at that time? [118]

A. None was asked, sir.

Q. Now, as I have followed your testimony, up to the time you got to Exhibit 5-8—Will you take those exhibits? A. Yes, I will.

Q. You say that Paramount products were better or you thought they were better than similar products that could be bought on the market, is that correct? A. I did.

Q. From No. 5-8, will you run through and tell us what exhibits indicate products where similar products could be bought on the market?

A. Do you happen to know what 5-8 was?

Q. 5-8. A. I have it.

Q. Paramount Insect Spray.

A. You wish me to go from there on?

Q. Yes, and give me the exhibit numbers of any products of the Paramount Pest Control Service

(Testimony of E. W. Bushing.)

where similar products could be bought upon the public market.

A. I could answer that for you by going through them, item by item, and naming the active ingredients of part of it and tell the material that is available on the local market. That product alone is not, by a long shot, a means of controlling this insect necessarily——

Q. Well, there are similar products selling on the public market, [119] where a person can buy them, or can buy the same thing as Paramount's products?

A. I wouldn't say the same thing, no.

Q. What do you mean by that?

A. The reason I say I wouldn't say the same thing is because many of these products are not on the market at all. I can name one in particular.

Q. That is what I am asking you. You say 5-8 was not on the market at all. I want to find out what other exhibit numbers refer to similar products that can be bought on the open market.

A. Paramount Moth Spray, Exhibit 5-11, cannot be purchased on the market.

Q. No. 9 is moth spray?

Mr. Rankin: No, 5-11.

A. 5-11, yes.

Q. (By Mr. Bernard): Are there moth sprays on the public market?

A. There are moth sprays on the public market. There is no Paramount Moth Spray on the public market.

(Testimony of E. W. Bushing.)

Q. Go ahead and tell me what other exhibit numbers indicate products—— A. 5-14.

Q. Exhibit 5-14 is what?

A. Paramount Poison Grain.

Q. Can poison grain be bought on the market?

A. That can be bought on the public market.

Q. Yes. I asked you to run through the list of exhibits there. A. 5-19.

Q. What is 5-19? A. Sodium fluoride.

Q. Can sodium fluoride be bought on the public market?

A. Yes. That is a basic material for all of those.

Q. Go ahead.

A. I believe that is all.

Mr. Bernard: That is all.

Redirect Examination

By Mr. Rankin:

Q. In the application of these poisons to the insects, I forgot to inquire of you on direct examination whether or not there is more to the application of the poisons than just giving them to the insects? Are there other interests to be considered? Do I make myself clear? A. No, sir.

Q. How about furniture, children, and the other things that poisons might affect, which are not intended to relate to them? Do you have to guard against that? A. Yes, we do.

Q. In making the application of the poisons, do you have to consider whether or not they would be dangerous to human life, health and property?

(Testimony of E. W. Bushing.)

A. Yes, we do. No one in the State of California can label [121] a product without it being first approved by the Bureau of Chemistry and, before they will approve it, these directions must be to their liking.

Q. Do you ever have any difficulty with the chemical department, or whatever department that is of the State of California which governs poisons in connection with getting any particular product that you want to use in your business?

A. Yes. Due to the extreme lethal qualities of sodium fluoro-acetate, their preference was that we handle the technical product by reducing—we knew and realized that there must be a dilution. And, after all, it must be broken down into minor dilutions to do the job that we wanted it to do.

To make sure we had a formulation that would be acceptable to them, we discussed and talked continually with them about a dilution of the formulation. This dilution of the formulation having been worked out, was accepted by them and we secured registration and, by the way, there are very few concerns in the State of California that have a registration for sodium fluoroacetate.

Mr. Rankin: If there is nothing from counsel, we will excuse you while you get that letter. Let me know, when you return.

Recross-Examination

By Mr. Bernard:

Q. You have testified about the application of these poisons. I believe you testified that, with one

(Testimony of E. W. Bushing.)

or two or three exceptions, [122] there are similar products on the market to those indicated by the Paramount label, although you claim that Paramount products are superior.

When you buy those other products on the public markets, of course, directions are given as to how they are to be applied, and so on?

A. Yes, directions are given..

Q. For instance, when you say there are many ant syrups——

A. Yes.

Q. If a man buys ant syrup on the market, of course, he gets directions as to how to apply it?

A. Yes.

Q. That is quite universal in these various concoctions for the control of rodents and insects, is it not?

A. It is more so in that specific instance you indicated than in rodent control. There is one large manufacturer of rodent grain outside of ourselves.

Q. In testifying about Exhibit 5-8, you mentioned a prominent oil concern. That is the Shell Oil Company?

A. Yes, it is.

Q. Do they still put out an insect spray?

A. They don't call it an insect spray.

Q. What do they call it?

A. 5-per cent DDT, I believe, the present name is. Yes.

Q. It is supposed to be an insect spray? [123]

A. No, the spray is given that name by a commercial company.

Mr. Bernard: That is all.

(Testimony of E. W. Bushing.)

Redirect Examination

By Mr. Rankin:

Q. Is there any one of these poisons here listed in these exhibits where the combination is not even known about? A. On these labels?

Q. Yes.

A. You mean the composition of them?

Q. Just held by Mr. Fisher and Mr. Sibert?

A. No, there isn't any.

Q. As far as you know? A. That is right.

Mr. Rankin: I think that is all. You may get that letter and then we will continue with the examination later on.

(Witness excused.) [124]

HAROLD W. HILTS

was thereupon produced as a witness on behalf of plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rankin:

Q. State your name to the Court?

A. Harold W. Hilts.

Q. Where do you live?

A. I live at 4131 Randolph Avenue, Oakland, California.

Q. What is your business?

A. Extermination.

Q. With whom are you connected?

A. Paramount Pest Control Service.

(Testimony of Harold W. Hilts.)

Q. Have you any particular department in that service?

A. Yes, auditing department.

Q. Are you also familiar to some extent with the matter of pest control?

A. Yes, sir.

Q. When did you first come with this company?

A. About May, 1940.

Q. Was it then a partnership?

A. Yes, sir, it was a partnership.

Q. Who were the partners?

A. Mr. T. C. Sibert and Mr. G. H. Fisher.

Q. Have you continuously remained with the pest control service [125] that they have conducted since that time?

A. Yes, I have.

Q. When did you first meet Mr. Brewer.

A. Some time in February of 1946.

Q. Like Mr. Sibert, had you been a fast friend of his, or an intimate friend?

A. No, sir, I hadn't.

Q. Did you ever meet him or have any connection with him, particularly prior to the time he came with this service?

A. No, sir.

Q. What did you do to assist Brewer in becoming established, if anything?

A. I brought Mr. Brewer to Portland in May or April, 1946, and assisted him in getting him familiar with the records and establishing his ways here so that he could carry on the business for the company.

Q. Had you had anything to do with him while he was in this short training period there, from February to April, 1946, at Oakland, California?

(Testimony of Harold W. Hilts.)

A. No, sir, only just to pass the time of day with him.

Q. Did you have any association with Mrs. Brewer? A. During that time?

Q. Yes. A. No, sir.

Q. After that time? [126] A. Yes, sir.

Q. In what capacity?

A. She was taking care of the books in the Portland office after that time.

Q. What can you say as to the system of the books as to whether it is required by the company or whether they are allowed to set up their own system?

A. The books are set up by the company, a specific system of accounting is set up. I travel throughout all our territory and I assisted her in getting established along that line after she came to Oregon.

Q. When you speak of all your territories, are they geographically bounded by natural state boundaries or are they split up so that there are two in some states?

A. They are split up into geographical boundaries in the states and also as to state boundaries.

Q. How many general agencies have you got of that nature?

A. Geographically bounded in a state?

Q. Yes. A. Well——

Q. How many agencies altogether, if you remember, Mr. Hilts? A. Eleven.

(Testimony of Harold W. Hilts.)

Q. How many of those can you say are bounded by state boundaries? A. Just two.

Q. Those two are what? [127]

A. Washington and Oregon.

Q. Were you familiar with the granting of the Oregon territory by Paramount Pest Control Service? A. I was.

Q. To whom was it made?

A. To Mr. Brewer.

Q. Were you familiar with the signing of the franchise agreement, Exhibit 24, in this case as of July 1, 1946, between Paramount Pest Control Service and Mr. Brewer? A. Yes, I was.

Q. After the execution of that franchise, to your knowledge did the parties continue performance under that agreement? A. Yes, sir.

Q. When did you become aware that there was any change or difference in any phase of that, Mr. Hilts?

A. In December, 1946.

Q. How did you become aware of that?

A. Mr. Sibert told me.

Q. What was the change?

A. The change as was illustrated at that time I did not understand completely.

Q. It related to what phase of it?

A. Change of payment.

Q. Was there any other phase or provision of that contract that was changed? [128]

A. No, sir.

(Testimony of Harold W. Hilts.)

Q. What did you do with respect to accounting statements under this contract between July 1, 1946, and December 31, 1946?

A. Did you say under the change?

Q. No, under the contract itself?

A. I was here first in October, the 13th, the first time that I was here under the agreement that had been entered into on July 1, 1946, and I had submitted at that time, after going through the records and closing the books, a trial balance, a profit and loss statement and balance sheet, on the business entered on the records at that time.

Q. On what basis did you submit that statement?

A. The books are kept on a cash basis and the franchise, as it was called, the 20-80 agreement, was based on 20 per cent of the gross receipts.

Q. Paid to whom?

A. Paid to the Paramount Pest Control Service in Oakland.

Q. And the 80 per cent—

A. —was left for Mr. Brewer to operate on and to take home for himself.

Q. At the time you submitted the October statement, on what basis did you submit it? On the franchise basis or the 80-20? A. Yes.

Q. Did you receive any resistance from Mr. Brewer in that regard? [129] A. I did not.

Q. Up to the time you learned of the different arrangement from Mr. Sibert, had you rendered other statements on the 80-20 per cent basis?

A. Yes, sir.

(Testimony of Harold W. Hilts.)

Q. Had you received any resistance from Mr. Brewer? A. No, sir.

Q. The dollar-for-dollar arrangement, as it has been termed, expired when?

A. December 31st, 1946.

Q. When it came to the January and February statements, 1947, on what basis did you submit those?

A. I submitted those on the 20-80 per cent agreement that was in effect as of July 1, 1946.

Q. Was that termed the franchise agreement?

A. That was termed the franchise agreement.

Q. When did you submit those?

A. I took the figures off the books March 13th and had them in rough draft and had talked with Mr. Brewer relative to the business in general and showed him the figures, and then I took those figures back to Oakland with me and also a check accompanying the total settlement for those two months of January and February to Oakland.

At that time, in Oakland, I prepared or had prepared typewritten copies of my rough draft and mailed them back to [130] Mr. Brewer.

Q. Did you, during the month of January, 1947, have any conference or talk with Mr. Brewer?

A. Yes, sir.

Q. When was that?

A. Around January 20th.

Q. Where was that?

A. That was in Portland, Oregon, in our office in Portland, Oregon, the Portland office.

(Testimony of Harold W. Hilts.)

Q. What was the purport of that conversation?

A. As I remember it, we discussed the various operations of the business and made comments as to how it was progressing, and the books were, of course, closed for December 31st, and I took the figures that I had to have to send back at that time, and any additional information, and then we discussed the business as to how it was progressing, and then we probably brought up—As I recall, he mentioned something to me about having had an understanding relative to an adjustment as to the change of payment under the franchise.

Q. Had you understood it then, at that time?

A. I didn't.

Q. What did you do then?

A. I told him I didn't understand exactly what it was and that it was not clear to me.

Q. What did you do then? [131]

A. I left after that time and went back to Oakland.

Q. What did you do at Oakland?

A. Went through my regular course of duties.

Q. What did you do with respect to the understanding at the time?

A. I couldn't do anything about it because the understanding that he had was with Mr. Sibert and Mr. Sibert was not available at that time and, so, I couldn't contact him.

Q. Did you discuss it with Mr. Sibert when he was available?

A. Not until March 15th of 1947.

(Testimony of Harold W. Hilts.)

Q. Was there anything else in this discussion of January 20th concerning Eastern Oregon?

A. January 20, 1947?

Q. 1947, yes. Mr. Sibert testified about that. I don't know whether it had been brought up with you or not?

A. No, it had not been.

Q. Then did you have any contact with Mr. Brewer during the month of February, 1947?

A. I was not in Portland and I had not seen Mr. Brewer during February, 1947.

Q. From your position as auditor in the Paramount Pest Control Service, do you know whether or not Mr. Brewer made any payments on his franchise—and when I say “franchise,” I am referring to the July 1, 1946, agreement—on the amount that he owed Paramount Pest Control Service? [132]

A. Yes, sir, he did. He made payment February 6 of 1947 in the amount of \$250.

Q. Did you enter that payment in your account?

A. Yes, they were reported on his records.

Q. Will you see if you can locate that in the file, the check which you describe as the February 6th payment?

A. Yes, I have it here.

Q. What is the exhibit number?

A. 30.

Q. Is there anything on that check that discloses the breakdown, what the payment was made for?

A. Yes. In our system of accounting, we have what we call the voucher system. The original copy goes to whomever it is made in favor of and the duplicate is retained in the office, and the duplicate

(Testimony of Harold W. Hilts.)

is an exact copy of the original, because a carbon is necessary to put it on there.

Mr. Rankin: May I ask you to hand that to the Court?

The Court: I don't want to see it just now.

Q. (By Mr. Rankin): One copy you have?

A. Yes.

Q. Do the original and copy both disclose the items of the February payment, as made?

A. The original must have disclosed it, but the original has a division, which is known as the check proper and the remittance advice part. The remittance advice is torn off when the party [133] in whose favor the check or voucher is made payable deposits it, and the only part that we have left here in evidence is the check part and the duplicate voucher part shows what was on the remittance advice that has been torn off. It discloses "For franchise, \$250.00."

Q. What is the total of the check?

A. \$338.00.

Q. What is the balance, the difference between the \$338.00 and the \$250.00?

A. In this particular case it is \$88.00.

Q. What is it for, generally speaking?

A. Well, it is for supplies for December, \$28.87, auditing for December, \$25.00, and billing statements, \$34.13.

Q. Did you make a request of Mr. Brewer for this payment?

A. I did not.

(Testimony of Harold W. Hilts.)

Q. Did you make any designation as to what it should apply on?

A. No, sir. He put that on there of his own free will.

Q. When it comes to the designation "For franchise, \$250.00," did you have anything to do with requiring that designation?

A. I never did, no.

Q. When was the next payment made by Mr. Brewer?

A. March 6, 1947. It is in the amount of \$250.00 and states "Apply on 1946 franchise."

Q. Was there any other item contained in that check except the franchise payment? [134]

A. No, sir.

Q. What you described as to the method of payment, as to the original and duplicate, particularly with reference to the voucher, applies to this check as well as the other? A. Yes, it does.

Q. Were there any payments made by Mr. Brewer on the January and February, 1947, franchise account?

A. Yes, there was. There was a payment made to me on March 13th when I was in Portland, going through the records, making up the statements for January and February. That payment was in the amount of \$494.25 which completed the total amount of his liability to us under the franchise contract for January and February.

(Testimony of Harold W. Hilts.)

Q. It is claimed, as you well know, by Mr. Brewer that these payments were all on account of the franchise, as modified, meaning the change of payment on the dollar-home and dollar-company.

Was there anything in connection with those payments which could have been reconciled with that dollar-for-dollar agreement? A. No, sir.

Q. Is there anything in these payments that is reconcilable with the franchise provision of 80-20 distribution?

A. Yes, there is. The duplicate part of the voucher here reads, "Franchise balance for January and February," and then [135] it records the January and February franchise, \$994.25, and "Paid, \$500.00; balance, \$494.25," and that was the exact amount of his remittance to me.

Q. On what basis?

A. On the basis of the 20-80 per cent franchise contract for January and February.

Q. Were any of those payments made by Mr. Brewer under any complaint or protest to you?

A. Absolutely none whatsoever.

Q. When did you complete your review of the books, your investigation?

A. You say when did I what?

Q. When did you complete it?

A. March 13, 1947.

Q. The first two of these checks are in round figures, are they not? A. Yes.

(Testimony of Harold W. Hilts.)

Q. If I recall correctly?

A. Yes, they are. One was \$338.00 even and the other was \$250.00 even.

Q. With respect to the franchise payments, what were they?

A. \$250.00 was included "For franchise," but the next and second one was just for \$250.00.

Q. That left an odd amount for the third check?

A. That is correct. [136]

Q. How much was that odd payment to complete the total payment under the franchise for January and February, 1947? A. \$494.25.

Q. You probably said, but I don't recall: When did you complete that examination?

A. Of January and February?

Q. Yes, January and February.

A. March 13th.

Q. Then what did you do?

A. I went back to Oakland. Mr. Brewer took me to the airport, and we had our usual—well, conversation that, "Oh, well, things are going along fine" and everybody was happy, and so on. He often drove me out to the airport and watched planes take off the ground. I remember that specifically.

Q. Was there any complaint made by Mr. Brewer that you were not treating him correctly?

A. No, sir, not at all.

Q. Was there any protest or objection on his part as to making the payments that he had previously made or had made at that time?

A. No, sir. His attitude was to the effect that he knew it was due and he was going to pay.

(Testimony of Harold W. Hilts.)

Q. Did he at that time indicate that he was under the belief that the dollar-home and dollar-company agreement of September 12th was still continuing? [137]

A. No, sir, he didn't.

Q. When you arrived at these figures showing a total of \$994.25 due under the franchise agreement for January and February, 1947, did you go over that matter with Mr. Brewer? A. I did.

Q. When did you get the figures that you went over with him?

A. The figures were on his books. I took them off the records of the office for January and February. They represented the figures that are used in figuring the terms of the contract, commonly known as the franchise.

Q. Did he understand it as you went over it?

A. He certainly did.

Q. Who made the entries in the books from which you took them, if you know?

A. Mr. and Mrs. Brewer, mostly Mrs. Brewer.

Q. Then, upon your return to Oakland, what did you do, upon your return to Oakland in March of 1947?

A. I went through my regular procedure, having made a rough draft, and prepared it to be mailed.

Q. A rough draft of what?

A. Of my examination of his records for January and February, 1947, and then at that time I asked Mr. Sibert if he would clarify for me his agreement relative to his understanding with Mr.

(Testimony of Harold W. Hilts.)

Brewer for the period starting July 1st, 1946, to December 31st, 1946. [138]

Q. Did Mr. Sibert do so?

A. Yes, Mr. Sibert did so.

Q. You say you went through your regular procedure of preparing your accounting. Did you mail to Brewer a copy of your accounting for January and February, 1947?

A. Yes, sir, I did.

Q. Can you state whether or not there is in this file such an accounting, this file of exhibits?

A. Yes, there is.

Q. What is that exhibit?

A. It is not in this exhibit file. Pardon me. Yes, it is. I think I recognize it here. No, I don't. It is not here.

Q. I hand you this second volume and ask you if you can locate it in there?

A. Yes, sir, I do.

Q. What is the number?

A. It is No. 57.

Q. Did you give Mr. Brewer credit in that accounting for the payment he had made by the check dated February 6, 1947, for \$250.00?

A. Credit was given to him on his books, and his book figures are recorded on here, yes.

Q. Did you make an accounting for February, 1947, also?

A. Yes, sir.

Q. Did you deliver both of these when the January and February [139] accounting was done?

A. I was not here in February or January.

(Testimony of Harold W. Hilts.)

Q. Did you give him credit for the February payment of \$250.00 on the franchise in your February statement?

A. That was not recorded on the books because—
Did you say in February?

Q. Yes.

A. I am afraid I don't understand that question. Yes, the \$250.00 payment that was made February 6th is recorded and he is given credit for that on his statement.

Q. Then, the balance of \$494.25, was he also given credit for that?

A. Yes, sir, he was. It is also a matter of record in his books.

Q. Were those entered on his records as well as your own? A. Yes.

Q. As relating to the amount of money due from Brewer to Paramount under the franchise of July 1, 1946? A. Yes, sir.

Q. Did you do anything else in relation to payments when you returned to Oakland in March, 1947? A. Yes, sir, I did.

Q. What did you do?

A. After understanding the agreement with Mr. Sibert, the agreement that Mr. Sibert and Mr. Brewer had entered into, which was [140] up to and including December 31, 1946, I then took the figures that we had for effecting an accounting on a settlement and prepared—Mr. Sibert and I prepared the figures together so that it would be right,

(Testimony of Harold W. Hilts.)

which was based on the "You take a dollar and I take a dollar" basis, and then mailed it to Mr. Brewer in Portland.

Q. Was there a letter of transmittal with that?

A. Yes, I wrote a letter along with that?

Q. What is the date of that letter?

A. March 15, 1947.

Q. What is the exhibit number so we will have it identified?

A. I don't have it here.

The Court: Take a short recess.

(Recess.)

Q. (By Mr. Rankin): Before the recess we were talking about Exhibit 29, which was your letter of March 15, 1947, to Brewer at Portland. "Enclosed is a statement of your account for 1946, also January and February of this year."

So as to expedite it, do you have the statement of your account for 1946 that was enclosed here?

A. No, sir, I don't.

Mr. Rankin: For the Court's information, at the previous hearing of this case in the Circuit Court Mr. Leo Smith gave that letter to Mr. Bernard and Mr. Bernard says he gave it back.

The Court: I have heard about that. [141]

Mr. Rankin: And we do not know where that is now.

The Court: Very well.

Mr. Rankin: Is that statement of January and February, 1947, in this list of exhibits?

A. Yes, sir.

(Testimony of Harold W. Hilts.)

Q. What is the number that appears?

Mr. Bernard: Did I understand Mr. Rankin to say that at the hearing in the Circuit Court he gave this statement of account for 1946 or this letter?

Mr. Rankin: No, the statement of the account and the letter. They are both together.

Mr. Bernard: No, just the letter.

Mr. Rankin: I wasn't there, then. I don't know anything about that. Mr. Bernard and Mr. Smith will have to finish that.

The Court: Don't argue about that.

Q. (By Mr. Rankin): Do you find that letter? That statement, rather? A. Yes.

Q. What is the exhibit number?

A. Exhibit 57.

Q. This letter (Exhibit 29) says: "You will note that this splits everything across the board for 1946 and we both come out with \$1,479.65 and you still have your \$1,000 investment in the business."

What did that indicate that the total revenue for 1946 was?

A. Well, the total amount that was split was \$1,479.65.

Q. The third paragraph says: "For January and February there is a net profit of \$1,016.55 with the franchise out of it, now you have drawn \$512.22 for both months"——

What franchise did you refer to when you said "the franchise out of it"?

A. I referred to the franchise that was in effect as of January 1, 1947, and the franchise that I re-

(Testimony of Harold W. Hilts.)

ferred to in this letter was based on the 20-80 per cent basis, which was for January and February of 1947.

Q. Then you say "now you have drawn \$512.22 for both months; if we take \$512.22 like you did that will be your franchise for January and February." What did you mean then by "franchise"?

A. I meant there that in the discussion that I had with Mr. Sibert down in Oakland March 15th, at the time this letter was written, that there was a thought brought to my mind by the Eastern Oregon venture was not as profitable as we had considered that it would be, and, on the basis that it was not profitable, I had suggested to Mr. Sibert that we, in trying to help Mr. Brewer, show him that we were in favor of trying to keep the man going and so he could make a supreme success of the area, without financial responsibility on his shoulders, that we would be willing to take for January and February the same amount that he took up to December 31st, 1946, and incorporated [143] that in this letter.

Q. Did Mr. Brewer make that request of you?

A. He did not.

Q. Was there any suggestion by Mr. Brewer to that effect in consultations or conferences you had with him in March or at any other time?

A. No, sir.

Q. Was it agreed to and this notice sent before Mr. Brewer was aware that it was to be done?

(Testimony of Harold W. Hilts.)

A. Please state the question again. I didn't get it.

Q. Was this agreement of yourself and Mr. Sibert to divide this January and February, 1947, return on the basis of the dollar-home dollar-company done before Mr. Brewer knew anything about it? A. Yes, sir.

Q. "Now you have paid \$994.25 as franchise for January and February which is \$482.03 over your January and February franchise." What did you mean by that, "over your January and February franchise"?

A. I meant that it was over the payment on the basis of the 20-80 per cent of the \$994.25 which was in effect for January and February and, therefore, according to the terms of the agreement that he had with Mr. Sibert.

Q. Your letter continues: "* * * as per above figures, this will be credited to the \$1,479.65, which leaves \$997.62 which [144] will wipe off 1946."

How much had he made in 1946?

A. How much? I don't understand that question.

Q. What had he made in 1946, do you know? In other words, what did this \$1,479.65 refer to?

A. That refers to the dollar-for-dollar agreement; in other words, \$1,479.65 was his portion, and we would get \$1,479.65 for 1946, from July 1st to December 31st.

Q. How was it paid?

A. It was never paid.

(Testimony of Harold W. Hilts.)

Q. Was it paid by this?

A. No, sir, that didn't apply in 1946. The payments that he made applied on January and February.

Q. Maybe it is my fault that I do not understand this, Mr. Hilts, but it says here, "This will be credited to the \$1,479.65." Where do you get the \$1,479.65?

A. That was the statement that was attached to the letter.

Q. Was that due from Brewer to Paramount?

A. That is correct.

Q. What for? What was the basis of that obligation?

A. On the change of payment basis he had with Sibert, and it was due for the period July 1st to December 31st, 1946.

Q. That is what I understood. I didn't know that you gave that. It is the contention by Mr. Brewer that this business was in a very poor condition and that he put it in a good condition, [145] this agency here, and he said something to the effect that when he took over this business it was in the red. Is that true?

A. No, sir.

Q. Do you know what the amount of earnings of this Oregon branch were prior to, at the time of, and immediately subsequent to Mr. Brewer's taking over in Oregon?

A. I will have to go back to 1945 to bring that out and show you the comparison.

(Testimony of Harold W. Hilts.)

During 1945 we never lost money up here in Oregon, which was—We never lost money up here in Oregon with the exception of one month, which was the month of December.

Q. What year?

A. 1945. At that time the loss was only about \$22.00. I don't remember the exact figure.

In January and February and March of 1946 we also made money, and we have had a statement prepared on that basis. I believe I turned those over to you.

In April and May after Mr. Brewer came to this area, the records show that we absolutely lost money. Then, again in June, it started to pick up again.

Q. Up to the time Mr. Brewer took control, was there any loss? A. No, sir.

Q. Immediately afterwards, for how many months was there a loss? [146]

A. For a—For two months after that.

Q. Then, after that, did Mr. Brewer start to make money?

A. Then he had started to show a little gain.

Q. Up to December, then, 1946, December 31, 1946, when this amount that you describe in your letter was due? A. That is correct.

Q. You go on and say, "Ted tried to explain this to me just before I came up this last time, but I didn't get it." That has reference to what?

A. That was in reference to the agreement that he had had with Mr. Brewer September 12, 1946.

(Testimony of Harold W. Hilts.)

Q. "Regarding Brooks and Ahern——" Who were they?

A. Mr. Brooks and Mr. Ahern were servicemen and salesmen that were involved in the Eastern Oregon extension campaign.

Q. " * * * We will split this the same." What did you mean by that?

A. The understanding there was that we would take the expenses and split them in half and we would take any income derived from this venture and split that in half, and we would both bear half of the burden; the company would bear its half and Mr. Brewer would bear his half; and, if there was a profit, that would be split; if there was a loss, that would be split.

Q. What actually happened under that agreement?

A. It was a loss.

Q. What was done? Were there any moneys received at all from [147] the business?

A. There were, and the income came into the Portland office and we paid the expenses. To begin with, it was one of those deals where we got the bad end of the deal until we had a settlement.

Q. What became of the money that was paid in?

A. Mr. Brewer got it.

Q. Have you been paid any of that?

A. No, sir.

Q. What became of the expenses that you incurred?

A. We paid them.

Q. Did Mr. Brewer compensate you?

A. No, sir.

(Testimony of Harold W. Hilts.)

Q. When, after March 15, did you again come in contact with Mr. Brewer in relation to this business between Paramount and Brewer?

A. In April.

Q. What time?

A. Oh, the first part of the month. I don't remember the exact date.

Q. What was the subject of that discussion?

A. It was carried on on the same basis as we have always operated. I had asked if he had received his letter of settlement and I think he said yes; he seemed to be satisfied with it, and I went ahead and prepared my examination of his records, closed them, prepared my profit and loss and balance statements and took them back to Oakland and sent them back to him.

At that time he also saw me off at the airport. He transported me back and forth from the airport and our relationship was of the best.

Q. When did you next see Mr. Brewer?

A. In May, 1947.

Q. At what time?

A. Around the 14th or 15th.

Q. What was the occasion? What was discussed in relation to this business then, if anything?

A. Just the same procedure. We went right along on the same basis.

Q. When did you next see Mr. Brewer?

A. In June, June 17th of 1947.

Q. Where?

(Testimony of Harold W. Hilts.)

A. I saw him here in Portland, and at that time Mr. Sibert accompanied me on the trip. We both were together with Mr. Brewer in the office here and went over the affairs of the business.

Q. When did you next see Mr. Brewer?

A. July 9, 1947.

Q. What was the occasion?

A. At that time I went ahead with my regular procedure and also prepared a settlement. We had an understanding, Mr. Sibert, Mr. Brewer and myself, back in June of 1947; we had an understanding [149] where he would request that we allow our settlement of the accounting on the franchise to run for the fiscal year which would be from July 1 of 1946 to June 30 of 1947, and we mutually agreed to that.

Back in June we also set forth a budget for the business, as the way the figures were on the books, stating absolutely the expenses that were involved and the income. Mr. Brewer had \$3,000 business, monthly business, on the books.

Q. I will come back to that in a moment. When did you next have any conference with Mr. Brewer?

A. July 9, 1947.

Q. After July 9th?

A. The next time I saw Mr. Brewer was July 31, 1947.

Q. That was after the termination or about the termination?

A. That was after we had received the letter in reference to terminating his agreement with us.

(Testimony of Harold W. Hilts.)

Q. From July 1, 1946, to and including the conference and meeting of July 9, 1947, had Mr. Brewer expressed to you any intention of terminating this relationship between the Paramount and himself, disclosed by this agent's agreement?

A. No, sir, none whatsoever. As a matter of fact, our relationship was pretty much on an even keel all the time. There was never any mention made relative to dissatisfaction. In fact, I had made different recommendations to Mr. Brewer, as I do when I am in the territory, because of my knowledge of the business, [150] because I am also a licensed operator and I understand the outside operations as well as I do the accounting.

Q. Did Mr. Brewer indicate that he wanted to terminate this relationship at any time?

A. He certainly did not.

Q. Did he indicate to you that there was a desire on his part to get a different adjustment that he was insisting on with respect to pay, other than what you had granted? A. No, sir.

Q. Have you, Mr. Hilts, stated fully the description of the relationship that existed between Paramount Pest Control Service and Mr. Brewer during that whole year? Is there anything you can add to what you have said about your relations?

A. Why, I believe that while I was talking about the June 17th trip there was an item that I had not related, which was to the effect that Mr. Brewer had said he had contacted the bank that he was doing business with here and he wished to be

(Testimony of Harold W. Hilts.)

able to let them know how he was getting along in his business, and he requested that we prepare a statement as to the operations. As he put it, the bank said that they wanted to know just exactly what the situation was as to his personal and business affairs, which is according to banking procedure, and at that time we prepared a rough draft and went down to the bank, Mr. Sibert, myself and Mr. Brewer, and with the express purpose of trying to get him acquainted with the bank and his position with the [151] bank—the banker happened to be Mr. Ridehalgh, of the California bank, I believe it was, or the Bank of California, I don't know which it is,—and he at that time listed all the operations of Mr. Brewer and the Paramount Pest Control Service.

Q. Did Mr. Brewer then tell the banker in your presence, or did he tell anyone, that he was dissatisfied with the treatment he was getting here, that the treatment he was getting was not proper or that the compensation he was receiving was not adequate?

A. No, sir, not at all. May I go on to say that at the time of the June 17th conference which you asked me about——

Q. I was just coming to that now. Will you please refer to that particular occasion and tell what transpired and what was said between the representatives of Paramount, Mr. Sibert and yourself and Mr. Brewer?

A. During that time, after I was completed with the records, closing the business up to and

(Testimony of Harold W. Hilts.)

including May 31st, 1947, we sat down and made a budget from the figures in his records, and that budget proved, being based on the amount of business that he had, that he had over \$3,000 worth of monthly business, that he could keep his franchise and pay all his bills and keep his territory in operation and come out with \$855 a month, in round figures and Mr. Brewer's own words at that time was to the effect, "Well, that being the case, I can't afford not to be on the 20-80 per cent franchise basis because I will make more money that way than I would the other way." Whereas, we would [152] only be getting \$600 out of it, he would be getting \$850, and that is not uncommon in our business.

The Court: What is not uncommon?

A. It is not uncommon in our business for a territory agent to receive more compensation on the franchise basis than they would receive on the 20 per cent.

The Court: Do they usually get about that, right around \$10,000 a year?

A. We have had operators earn more than that, sir.

The Court: What is your gross business, about?

A. You refer to all our operations?

The Court: That is right.

A. Well, it runs upwards of probably \$700,000.

The Court: A year?

A. Yes, sir.

(Testimony of Harold W. Hilts.)

The Court: Increased pretty rapidly, has it?

A. Well, it has a pretty steady growth now. It increased rapidly during the war, as most businesses did, but we still have not dropped down. We are increasing.

The Court: A very profitable business?

A. A very profitable business, if it is run right, yes.

The Court: Highly profitable, at that rate?

A. That is correct.

Q. (By Mr. Rankin): Your franchise calls for an 80-20 distribution, [153] respectively, between agent and company? A. Yes, sir.

Q. What do you estimate, in general, it costs to process or serve these contracts, with the expenses paid by the agent?

A. 60 per cent, average. In other words, that is the basis on which the franchises are drawn.

Q. So, that leaves 20 per cent for the agent and 20 per cent for the company?

A. That is correct, sir.

Q. 20 for the company is fixed, is it not?

A. Yes, sir.

Q. And is the 20 per cent for the agent fixed, or can he vary that 20 per cent by his method of operating the territory?

A. He can definitely vary that by his method of operating.

Q. What are some of the figures that are less? How much less than 60 per cent does an agent use in operating his territory?

(Testimony of Harold W. Hilts.)

A. Do you mean how much more than 60 per cent?

Q. How much more and how much less? If he operates at less than 60 per cent, he gets that difference, doesn't he? A. That is right.

Q. How far down below 60 per cent do agents go? A. It can go as low as 45 per cent.

Q. Sometimes if an agent is not a particularly good operator, how much more than 60 per cent does it cost him?

A. It can run as high as 75 per cent operation.

Q. Going back to the June 17, 1947, conference, was there anything else that was said at that time between Mr. Brewer and you and Mr. Sibert, that you have not related?

A. Yes, there was. Mrs. Brewer was in San Francisco or Sunny Hills, California, and, when we found that out, Mr. Sibert and Mr. Brewer and myself—While Mr. Brewer was taking us to the airport, why, Mr. Sibert got the idea probably he would like to go down and see his wife.

Q. Is that the same transaction or occurrence Mr. Sibert testified about this morning?

A. Yes, sir.

Mr. Rankin: Well, we won't repeat it.

The Court: Whom do you blame for all this trouble, Mrs. Brewer? Is that what you were leading up a minute ago?

A. I didn't make any contention about it, no, sir.

(Testimony of Harold W. Hilts.)

The Court: Did you hear some remarks she made down there?

A. No, sir. You mean that is why I started to relate that?

The Court: Yes.

A. No, sir.

Q. (By Mr. Rankin): Do you have anything to say about the collections here that has not been said?

A. Well, I noticed that the balances that were due Mr. Brewer that the customers owed him kept crawling up each month; in other words, they were not collected, and I would keep referring to it, and at the end of June there was a balance of over [155] \$3500—\$3600—on the books.

A. As I recall, the contract, which is here and which speaks for itself, makes him responsible for those collections?

A. That is correct.

Q. That is, they were to be made by Mr. Brewer?

A. Yes, sir.

Q. Did he make those collections you are talking about?

A. He eventually collected all he could get out of the business; in fact, he collected everything, and then drew it out of the bank.

Q. Just describe what you mean by that. What was his process?

A. Well, he knew that he had to clear his accounts receivable by the medium of showing payment by the collection that he made on those accounts receivable. Therefore, he could not just

(Testimony of Harold W. Hilts.)

collect the money and stick it in his own pocket, figuring that it was his. He had to run it through the books, so he would run it through the books. Then he would turn around and draw a voucher or check and put it in his own personal account or do whatever he wanted to with it.

Q. Let us turn to some of these items that we are claiming here, Mr. Hilts.

The Court: Are you going into the question of damages?

Mr. Rankin: Yes.

The Court: Put that off for awhile. Let us try the other feature. Let us try the equity feature of this case. [156]

Mr. Rankin: All right, your Honor.

Q. Did you cover everything now that occurred in the June 17, 1947, meeting or conference?

A. Yes, sir, except that you stopped me when I was relating the conversation.

Q. That is the same thing Mr. Sibert testified to?

A. Yes.

Q. So there is no need to repeat it. Now, then, you spoke of an accounting in July, July 9, 1947.

A. Yes.

Q. How did you prepare that accounting?

A. Well, that was prepared on the basis of "You take a dollar, we take a dollar."

Q. And why was that done?

A. Because Mr. Brewer had requested that we run it up to the fiscal year, as I mentioned in my

(Testimony of Harold W. Hilts.)

previous testimony, and asked that we wait until the end of June, June 30th, to make settlement.

Q. Did you agree to do that? A. We did.

Q. At his request? A. Yes, sir.

Q. State for what period that compromise or adjustment covered?

A. Covered from July 1, 1946, to June 30, 1947.

Q. Did you prepare a statement for Brewer in connection with the accounting on that basis for that year? [157] A. Yes, sir, I did.

Q. Is there a copy of it in evidence?

A. Yes, there is.

Q. What exhibit number is it?

A. Exhibit No. 36.

Q. Did you show these figures to Mr. Brewer?

A. Mr. Brewer helped me compile them. As a matter of fact, we spent over two hours on it together.

Q. Where did you and Mr. Brewer get the figures from?

A. Most of them were taken from his records. Some of them were in invoice form that were not entered on his records.

Q. Then what was said by you and Mr. Brewer with respect to this accounting of July 9th?

A. Prior to the time we started to effect this accounting, Mr. Brewer had a notion that we were going to make an accounting as of June 30, 1947, and I told him after I had prepared my examination of his books up to June 30, 1947, we were going to sit down and effect a settlement, taking in the

(Testimony of Harold W. Hilts.)

fiscal year's operations, and I told him that we were going to settle it, and he agreed that we should settle it if I had to stay a week to do it. Thereafter, we sat down and started to work on the figures.

Q. What did you do? Just go ahead and state what was done in the compilation of this accounting, please?

A. To get our dollar-for-dollar agreement, we took the accounts [158] receivable that he could collect, money that he could get; we took the asset investment that had not been charged into the records as expenses; took the cash on hand in the bank which was recorded against the expenses of operation, that is, left after the operation, and then we also recorded the amount of money that Mr. Brewer himself had drawn for that period of time, and added those figures.

Then we had some bills that were on hand that had not been paid as of June 30th, because the books were operated on a cash basis, and they were not set up in accounts payable and, therefore, they were due. We subtracted that figure.

Then we took half of the expenses of the Eastern Oregon run and subtracted that figure.

Then we took the bills that Mr. Brewer had owed Oakland, which were accrued and some of which were even involved in the settlement or accounting on the settlement as of December 31st, and we subtracted that figure.

Then the total was split in half. That would give us the exact figure, the real amount that there was

(Testimony of Harold W. Hilts.)

left, including Mr. Brewer's drawings and everything in the business.

Then we took one-half of the Eastern Oregon run that had not been paid us that year, and we added that, which was due us.

Then we subtracted half of the amount paid a man by the name of Torrach, wages for the period for which he was hired, [159] and gave him credit for that.

Then the statement goes on to show one-half of the amount of the franchise that was paid, based on January and February of 1947, and we gave him credit for that, and then we show the overdue bills that was owing to Oakland, and we added that.

That was the figure I referred to as part of it being in 1946, because we had that money coming. We had never been paid that money, and it was justly ours.

Then there was a piece of equipment known as "Hi Fog" that had not been paid for, which would become an asset on his records, and he owed us for it, and we charged that to him.

We took the total figure and Mr. Brewer agreed upon it, so much so that he gave me a check in payment of part of this settlement.

Q. What was the total that he owed, according to your joint understanding? A. \$3,359.61.

Q. What amount did he pay?

A. He paid \$259.61, leaving \$3,100, in round figures.

(Testimony of Harold W. Hilts.)

Q. Was there any discussion of the payment?

A. There was not, and we went on, after we had agreed upon it, and I asked him how he wanted to pay it off, and he said, "Well, I will see how the money comes in. As the money comes in, I will be glad to, naturally, pay it off, as long as it doesn't hurt [160] the business," and we accepted it that way and agreed upon it.

Q. Why didn't he pay the total amount, \$3,359.61?

A. He didn't have that much, although there was that much and more represented in his books and assets and inventories. He didn't have that much cash on hand.

Q. Was there anything said why he should pay that odd amount?

A. No. That was his way of wanting to do it, and I accepted it that way. In that I was in every way trying to make him feel that there was no pressure being brought to bear on him at all. That was his own figure, his own idea, and I accepted it.

Q. Was there any indication on July 9th, when you had this conference with him, that he was going to cancel his contract thirteen days later?

A. No, sir, none whatsoever. When we received his letter in our Oakland office, it was like a bomb-shell in our camp.

Q. What did you do after you received that letter? By the way, going back to that statement, which exhibit is that? A. 36.

(Testimony of Harold W. Hilts.)

Q. Did he make any endorsement on it?

A. Yes, he did. He set forth the check number and the amount that he paid on it, making a record of that, so he could keep track of it.

Q. Is that endorsement in his own handwriting?

A. That is in his own handwriting. [161]

Q. What does it say?

A. It says "July 9, 1947, paid, Check Number 413, \$259.61."

Q. When did you next come in contact with Mr. Brewer? When did you next come in contact with Mr. Brewer after the receipt of his letter of July 24, 1947?

A. The next time I saw Mr. Brewer was July 31st, 1947.

Q. Whereabouts was that?

A. In Portland, Oregon. I was registered in the Roosevelt Hotel at the time, and Mr. Brewer came up to the hotel. He knew, of course, that I was in town, and when he came into the hotel room my first words to him were, "Well, Charlie, what in the world happened?" And he says, "Well, I don't know; just couldn't seem to make it go," and so he said——

I said, "Well," I said, "what are you going to do?" And he said, "Well, she is all yours, if you want it." He said, "Tomorrow you come down and we will take an inventory and I will give you these supplies," and we had a general conversation along that line, and so I asked him where I could get in

(Testimony of Harold W. Hilts.)

touch with Mr. Rightmire and he said, "I don't know exactly where he lives," and I said, "Well, can't you give me his address? Isn't it in the office?"

"Yes," he said, "I will get it for you. I will get it at the office on my way home. I will get it for you and call you up and give it to you on the telephone." [162]

I said, "I would like to see him tonight, if I could," and he said, "I don't know. I don't think it will do you much good to see Mr. Rightmire. Rightmire isn't going to stay in the exterminating business any more. Rightmire is sick."

I said, "Well, if, as you say, he is sick, I would like to go, as a company representative, and see him and tell him we are sorry about his sickness, and be interested in general because he is an employee of ours."

He said, "Well, I owe Mr. Rightmire a vacation." And he said, "He is through. He isn't going to work any more."

So I said, "Then, if you will give me his address, I will appreciate it," and he said, "I will stop at the office."

I waited for over an hour, which was more than ample time for him to arrive at the office and obtain the address, and I didn't hear from him, so I made a call to his home and asked him what had happened.

He said, "Well, I couldn't find the address," so I said to him, "Well, I understand you were going to at least let me know," and he said, "Well, I was going to call you up while I was eating dinner," so

(Testimony of Harold W. Hilts.)

I said, "Well, that is fine," and hung up. There was no more conversation at that time.

I found out later that his address was in the records and that it was in a little slide telephone file that was in the office, and so I obtained it myself and saw Rightmire the next day. [163]

Q. What was your conversation with Mr. Rightmire?

A. I went out to his house, and we sat out front talking, and he told me that he thought Mr. Sibert was one of the dirtiest guys he had ever talked to or seen and that he wouldn't have any part of it, and that he never realized what a dirty louse he was, and, of course, that made my blood boil, because I had been associated with Mr. Sibert for some time, twelve or fourteen years; had known him prior to my association with the business. He went on with that conversation. He said he would not work in the extermination business for anybody. He said, "I am through."

I said, "What are you going to do?" And he said, "I don't know what I am going to do." He said that.

"Well," I said, "you are really not interested at all?" And he said, "No, I'm sick. I am not going to work at all. I have had to take treatments from my doctor and I am, in general, run down. I have been working too hard for Brewer, and I am run down. I don't know what I will do. Maybe I will get something, as I have had some previous selling experience."

(Testimony of Harold W. Hilts.)

We continued the conversation in general, and then he reiterated that he would not have any part of Paramount or any of its organization at all; he was entirely through and said that there was no reason in the world for him to work for an outfit that would do things like Brewer or Paramount, or like Paramount, had done, and so then I said, "Well, you are not [164] going into business at all? Then I can't offer you the proposition that I had in mind when I came out here," and he said, "No, I am not interested at all."

Q. When did you know he was working for Brewer?

A. We found that out, well, the third or fourth day of August, on contacting our accounts, through men that we had to bring into this area to protect our business, because we operated on a monthly service basis, and there is so much business that has to be done and so many men have to do it, and, as we understood one fellow, we did not have any organization and our customers knew we did not have any organization; in fact, we were supposed to have been liquidating, which was news to us.

While we were contacting our customers, our men would run into these service slips of Brewer's and, in some instances, Mr. Rightmire's name appeared, indicating that he had serviced them.

Q. Did you ever discuss the matter with Mr. Rightmire again?

A. I never did. I have never seen him since.

(Testimony of Harold W. Hilts.)

Q. In respect to Mr. Duncan, did you have any conversation with Mr. Duncan prior to August 1, 1947?

A. Yes, I saw him during the time that I was here on the 31st.

Q. The 31st of what?

A. July, 1947. He came down to the warehouse with Mr. Brewer on one occasion.

Q. When did you learn that Mr. Duncan had gone with Mr. Brewer? [165]

A. Not until later on, because Mr. Duncan was supposed to have taken a trip back East or the Middle West and then come back out here so, if he was going to work for Mr. Brewer, according to all I can find out, that made the earliest date around August 20th, or thereabouts.

Q. Had Mr. Duncan at any time during 1947 indicated to you any dissatisfaction that he had with the company? A. He did not, no, sir.

Q. What was the nature of your relationship with Duncan during 1947 or any other time, prior to August 1, 1947?

A. Mr. Duncan had always had a good relationship with me, as with all—as I have with all of our employees.

Q. Was that true of the relationship with the company? A. Yes.

Q. Do you know of any time when he had spoken of Mr. Sibert or any other member of the company as Mr. Rightmire had spoken of Mr. Sibert?

A. No, sir, I don't.

(Testimony of Harold W. Hilts.)

Q. How about Merriott?

A. I had a conversation with Mr. Merriott Saturday morning. He was working on his car.

Q. What Saturday morning?

A. Of August 1st. He was working on his car in back of Mr. Brewer's home, and at that time I talked to him and asked him if he wanted to continue to work for Paramount Pest Control [166] Service and he said, "Sure, I will work for anybody that will give me a job."

I said, "Well, I think we can offer you a good job," and he said, "Well, I will be there." I said, "Well, when will you show up?" And he said, "I think I will have my car finished so I can be on the job Monday morning."

I said, "That being the case, we will look for you Monday morning," and he said, "That is okeh by me. I will be there," and, of course, Monday he didn't show up.

Q. Had there been any indication on Mr. Merriott's part prior to that time as to whether or not he was dissatisfied in any manner as a Paramount Pest Control Service employee?

A. None that I could notice at all.

Q. Did you have any conversation with Mrs. Rosalie Brewer, the wife of Charles P. Brewer?

Mr. Benard: When?

Mr. Rankin: During the month of July.

A. No.

Q. July, 1947?

A. July of 1947? I didn't see Mrs. Brewer at all.

(Testimony of Harold W. Hilts.)

Q. You ultimately ascertained, did you not, that Mr. Brewer, your agent, and Mr. Duncan, Mr. Rightmire and Mr. Merriott, who had been your employees and operators, were all leaving your company? A. Yes, sir. [167]

Q. And Mrs. Brewer, who had kept the office, was leaving with her husband?

A. That is correct.

Q. Was there anybody left in your organization here in Portland?

A. There was not. We had to transport men from Washington and California into this area, at great expense to us, to get them to contact our customers. We even had to bring supplies and equipment into the area. I had ordered it ahead of time because Mr. Brewer, after saying that he would turn over to me the equipment, as per his franchise agreement, on termination, that he would turn over to me his supplies and equipment—I left it at that until I tried to get them on Saturday morning, August 1st, at which time he refused me entry into his warehouse and instructed the man, Mr. Celsi, with whom the lease was signed, not to allow me to go in there at all, even after he had turned over the key to me to that warehouse, and said that I had no business in there, and there was a little bit of a scene at the time, at which time we stated to Mr. Celsi—Mr. Fisher and I were there, and Mr. Brewer and Duncan were there together, and I said, “We will abide by Mr. Brewer’s request and we will not touch the warehouse or try to gain entry to it until he requests it himself.”

(Testimony of Harold W. Hilts.)

Q. How long did you stay here at that time?

A. I was here about three weeks.

Q. During that three weeks what were you doing? [168]

A. Checking the supplies, trying to help organize the men that were then sent here and, in some cases, contacting a few of the customers, former customers. I found out they were former customers; because of Mr. Brewer's action, they were not our customers any more. Managed the business in general.

Q. Did you get any inventory from Mr. Brewer of the articles that had been here in the Paramount Pest Control Service?

A. Mr. Brewer and I took inventory together.

Q. What happened to that?

A. That was retained in the files.

Q. What did it disclose as to whether or not you had been delivered all the equipment that you were to take?

A. Well, when I realized what had happened, as per good business judgment, I took into consideration that probably I did not have all the inventory. I did not think I had a complete inventory and, so, I requested to go out to his house with him. At that time I went out to the house with him and we picked up various little items and some chemicals and some things like that, and he had told me at that time there was a little piece of spray equipment, which is foreign to our type of operation, and he said he had purchased that himself, or he had made a down payment on it, but he had—or he had bor-

(Testimony of Harold W. Hilts.)

rowed it—and he had turned it back. I left that in his possession, as far as that is concerned.

Of course, he refused to turn over any of the equipment [169] after that time which was in the warehouse. As a matter of fact, the actual situation was this, that, after he gave me access to the warehouse and the office, then, when I tried to get some equipment out of it is when I ran into trouble with Mr. Celsi, the owner of the warehouse, and he would not allow me entrance until Mr. Brewer had come down, and I did notice, when Mr. Brewer came down and checked the equipment later, that there was equipment that was not there that he had shown on the inventory, indicating that he had taken it out and was bringing it back, when he finally agreed to turn it over to us. His excuse was—it was quite an involved story.

These supplies and equipment, or the equipment in this particular case, that he had brought back, which were missing upon my second investigation of the warehouse, he said was used to spray some insects that was in Mr. Earl Merriott's home, but the complication of that is that Mr. Earl Merriott was supposed to have been on a hunting trip and he was still supposed to have been spraying his home with this equipment.

Q. How about the chemicals? Do you have any record of the chemicals, as to whether or not Mr. Brewer took any of the chemicals?

A. I wouldn't know, because I did not search his premises. I didn't think that was my right.

(Testimony of Harold W. Hilts.)

Q. You don't know whether or not any other department of Paramount Pest Control Service furnished him with any particular [170] poisons which were not returned to Paramount later?

A. I didn't get your question, Mr. Rankin.

Q. I had reference to whether you had knowledge that some other departments of Paramount Pest Control——

A. Oh.

Q. ——some other agency had furnished him with any materials?

A. Mr. Osborn from Seattle, manager and agent, had sent him, just previous to this time—I say just previous to this time; a matter of a few days—some Compound 1080 that he had borrowed from Mr. Brewer at an earlier date.

Q. Do you know what quantity that was?

A. Yes, he returned him three cans.

Q. Is that 1080 the item Mr. Bushing described as being very difficult to get?

A. Yes, sir.

Q. And being very lethal in its qualities?

A. That is the product, yes.

Q. Three cans. What is the size of those cans?

A. They are eight-ounce cans.

Q. How long would three eight-ounce cans last, ordinarily?

A. Depends upon how much business a man did with those three cans. It could last a year.

Q. Do you know whether or not Mr. Brewer was doing business as a pest control business under any assumed name?

A. Yes. [171]

(Testimony of Harold W. Hilts.)

Q. When did you learn that?

A. Immediately, on the 3rd or 4th of August.

Q. August 3rd or 4th? A. Yes.

Mr. Rankin: I think all this matter here is of record, your Honor. I will expedite it I think by simply calling the attention of the Court to it.

Exhibit 46 is the assumed business name certificate, sworn to by Rosalie Brewer before H. K. Phillips, Notary Public, acknowledged before H. K. Phillips, Notary Public, I should say, and recorded in the records of Multnomah County, Oregon, and attached to this is the following certificate by Al L. Brown, County Clerk: “. . . do hereby certify that the above copy of assumed business name certificate is a correct transcript of the original, as the same appears of record and on file in my office and in my custody.”

Then there is, as Exhibit 47, a certificate of retirement, reading: “Know All Men by these presents that Rosalie Brewer, the undersigned who have (sic) heretofore been conducting the business of Pest Control under the assumed name or style of Brewer’s Pest Control and who have (sic) heretofore filed a certificate of such assumed name with the Clerk of the County of Multnomah, State of Oregon, have (sic) retired from the said business and no longer have (sic) any interest therein.

“Witness our hands and seals this 27th day of August, [172] 1947,” and signed “Rosalie Brewer.”

On that same date, referring to the 27th of August, 1947, the following certificate of assumed busi-

(Testimony of Harold W. Hilts.)

ness name was filed: "Know All Men by These Presents, that the real and true name and postoffice addresses of the persons conducting, having an interest in, or intending to conduct the business of pest control under the name or style of Brewer's Pest Control, at 4929 N. E. 28th Ave., Portland 11, Oregon, County of Multnomah, State of Oregon, are the following, to wit: Charles P. Brewer, Postoffice address 4929 N. E. 28th Ave., Portland 11, Ore."

All three of these certificates, two of assumed name and one of retirement, are duly certified by the County Clerk as being certificates on file in his office.

Q. (By Mr. Rankin): Now, Mr. Hilts, you have stated briefly that you found that Mr. Brewer was taking over some of the customers of Paramount Pest Control Service. Tell what you did in regard to that investigation.

The Court: Lay that aside. I would like to hear the cross-examination now on what he has already testified about.

Mr. Rankin: Yes, your Honor. All right.

Cross-Examination

By Mr. Bernard:

Q. What contact did you have with Mr. Brewer at the time you came to Portland? Strike that. What contact did you have with Mr. Brewer up to the time you came to Portland in April, 1946? [173]

A. Oh, I had seen him in the office.

(Testimony of Harold W. Hilts.)

Q. You did not discuss any of the formulas in any way, anything like that with him, did you?

A. No, sir.

Q. When you came to Portland in April, 1946, did anybody else come along? A. No, sir.

Q. You came up to help him set up a set of books? A. The books were already here.

Q. What did you come up for?

A. We came up to assist him with the territory and get him acquainted with the operation of the area. Mr. Brewer had never been in a position to know these things.

Q. How long were you here?

A. Oh, it was a week or ten days.

Q. You had not discussed any of the formulas of the company with him?

A. Oh, we discussed certain things of operation, certainly, such as how certain things were being used, and I assisted him in some questions that he had asked and also gave him some advise as to what had been my experience.

Q. In the extermination business?

A. Right.

Q. What contact did you have with him after that, during the year 1946, if any? [174]

A. I saw him the next time May 5, 1946.

Q. Maybe I can bring it out this way: When were you informed by anybody that the contract or franchise was being modified as to the matter of payment? A. In December, 1946.

(Testimony of Harold W. Hilts.)

Q. December, 1946? A. Yes.

Q. Who informed you as to that?

A. Mr. Sibert.

Q. Did he tell you what he had agreed upon?

A. Did he tell me?

Q. Yes. A. Yes.

Q. Did he tell you the date when he had agreed upon it?

A. He told me it was in September, September 12th.

Q. He had never mentioned it to you up to that time? A. No.

Q. You testified as to some conversation you had with Brewer January 20, 1947. Did Mr. Brewer tell you at that time that it was not his understanding that this change in the basis of payment was to continue after January 1st,—

A. No, sir, he did not.

Q. What did he tell you at that time?

A. There was no specific mention of that.

Q. I understood you on direct examination to say that on [175] January 20th he told you that there was to be a rearrangement as to percentages?

A. That was up to December 31st.

Q. When did he send—When, rather, did you send him this statement? A. March 15, 1947.

Q. Maybe I can make it clearer. Maybe I had better make it clear. When did you send him the statement showing the January and February payments made at that time on the 20-80 percentage basis? A. At that time, March 15th.

(Testimony of Harold W. Hilts.)

Q. Didn't you give that to him earlier than that?

A. Not on January and February, no sir. I had let him see my rough draft, but I didn't give him his statement.

Q. You say you let him see your rough draft,—where?

A. In Portland.

Q. That showed the division of the profit 20-80 under the franchise as written?

A. It covered the franchise due, yes.

Q. On what date did you show him that?

A. March 13, 1947.

Q. What did he say to you?

A. He said, "Well, that is fine," and he made a payment to me.

Q. What did he say to you about it?

A. Nothing at all. [176]

Q. Well, how did it happen that two days afterwards you sent him this letter, changing that arrangement and putting this on a different basis?

A. That was of my own free will.

Q. You mean to say you changed it of your own free will, without any suggestion from Brewer?

A. Absolutely.

Q. And without explaining to him why you were doing it?

A. I didn't have to explain it to him. He understood the settlement, as I found out later myself, about the December 31st settlement, and it was understood by him. I didn't need to explain it to him.

(Testimony of Harold W. Hilts.)

Q. As I undersand it, you claim on March 13th you had rendered him a statement for January and February, made up on the 20-80 per cent basis?

A. Yes, that is right.

Q. And he made no objection to it?

A. He did not. He made a payment.

Q. And, without any further conversation with him or suggestion from him, you wrote this letter of March 15, 1947, after conversing with Mr. Sibert?

A. Yes.

Q. After conversing with Mr. Sibert?

A. That is right.

Q. Did you send him this letter special delivery?

A. I may have. I don't remember. We often do that.

Q. Was it because he told you if you were going on with that old arrangement he was through?

A. No, not at all.

Q. Where did you address it to him, his home or the office?

A. I wouldn't remember exactly. We addressed mail both places.

Q. Is it not a fact that you sent that letter special delivery to his home?

A. No, it is not not to my knowledge.

Q. Would you say you did not?

A. I don't know whether I did or not. I don't remember.

Q. You say in here, "Now, you have paid \$994.25 as franchise for January and February

(Testimony of Harold W. Hilts.)

which is \$482.03 over your January and February franchise."

In other words, you had made out a statement and forwarded it to him with this letter showing January and February on the modified arrangement, hadn't you?

A. No, sir, not on the modified arrangement.

Q. In this March 15th letter?

A. That is a correct statement that I sent the January and February statement. January and February was not on the modified arrangement. Those figures were merely used—the statement I sent him at that time was as of December 31st.

Q. You say, "For January and February there is a net profit of \$1,016.55 with the franchise out of it, now you have drawn \$512.22 [178] for both months; if we take \$512.22 like you did that will be your franchise for January and February."

That was on a different basis than the one you had, which you showed him on March 13th, wasn't it?

A. Yes. It was only set forth in that letter, however. There was no different accounting as of January and February, 1947, other than the 20-80 percentage basis.

Q. Then, you say: "Ted tried to explain this to me just before I came up this last time, but I didn't get it." Who do you mean by "Ted"?

A. Mr. Sibert is referred to as "Ted." He tried to explain to me the understanding that he had had with Mr. Brewer back in September, which ran up to December 31st of 1946, and I didn't understand

(Testimony of Harold W. Hilts.)

it, namely, operating dollar for dollar, on the dollar-for-dollar agreement.

Q. Are you through?

A. No. I said, namely, the dollar-for-dollar agreement.

Q. Then, this paragraph in here where you say, "For January and February there is a net profit of \$1,016.55 with the franchise out of it, now you have drawn \$512.22 for both months; if we take \$512.22 like you did that will be your franchise for January and February", that was done out of the goodness of your heart, by you and Mr. Sibert?

A. That is exactly right. Could I have a copy of the exhibit so I could follow it? [179]

Q. You have the exhibit there.

A. All right.

Q. I am not through referring to it, but if you want to read it and make any explanation, go ahead.

A. No.

Q. By the way, you spoke of a man named Taylor who was working here when Brewer got here or came up here. What was Taylor's arrangement with the company?

A. Spoke of a man by the name of Taylor?

Q. Yes, who preceded Mr. Brewer. I will put it this way: Who was working in this territory prior to the time Mr. Brewer came? A. Mr. Taylor.

Q. What was Mr. Taylor getting?

A. What? I don't understand.

Q. What was his remuneration? What was he getting?

(Testimony of Harold W. Hilts.)

He was working on a franchise—he was working on a branch manager's agreement, the same agreement Mr. Brewer signed and was working on until July 1, 1946.

Q. In other words, he was getting \$250 a month?

A. No, he was getting \$200 a month and he was getting 20 per cent of the gross profits in the territory.

Q. Is that the arrangement you gave Mr. Brewer when he first came up here?

A. Exactly the same.

Q. \$200 a month plus 20 per cent of the gross profits? [180]

A. Yes, sir.

Q. That is the arrangement that was made with Mr. Brewer when he first came here?

A. Yes, sir. Any men that are drawing over \$200 per month would have been charged to him as commission at the end or beginning of each month, and if the territory did not make a profit so that he would receive anything like that, he still retained the amounts for the men that would be involved, and that was his salary. To show you the way we operate and the amount of fairness of it, we try to help these fellows; in other words, we don't say, "If you check out and don't get——" We don't make a demand on him for it, never have.

Q. I understand, then, on March 15th you suggested this other arrangement in this letter to Mr. Brewer because you thought it was more advantageous to him?

A. Yes, sir.

(Testimony of Harold W. Hilts.)

Q. What happened in June, June 17th to 20th, that caused the arrangement to be changed as of July 1st?

A. We carried everything clear up to the end of the year, which made it then January and February, 1947, and up to the end, or December 31st, 1946.

Q. Why did you give him a different arrangement beginning July 1, 1947? Why did you go back to arrangement as of July 1st?

A. Mr. Brewer's idea. He wanted it.

Q. Although the other arrangement, you thought, was better, he [181] wanted to go back to the franchise arrangement?

A. Yes. He was better off ultimately. I might point out here on the basis of the dollar-for-dollar agreement, as we had understood that, to show you how much more or, rather, how much Mr. Sibert had believed in Mr. Brewer, Mr. Brewer could have accumulated a bank account, assets and everything else and only drawn a very meager amount for the period of time in which the same amount would be sent to us and then, if he wanted to—we were tied where we couldn't in any way come out on top; if he wanted to, he would have the whole thing and pull out.

Q. Under this 20-80 per cent arrangement you were to get 20 per cent of the gross business done, whether collections have been made or not?

A. That is correct.

Q. Any collections that were not made or losses sustained, why, of course, as to those Mr. Brewer would have to stand them?

(Testimony of Harold W. Hilts.)

A. No, sir, absolutely not. If he does not make a collection or a customer cancels out, leaving a balance owing, owing a balance, we don't take 20 per cent of that figure; we give it to him as a credit.

Q. This accounting you made for July, 1947, the figures you arrived at there are based on the accounts receivable? A. That is right.

Q. In other words, you figured the gross amount of business done; you took 20 per cent of that and arrived at the amount [182] which you claim to be due.

A. On the basis of the gross business. Let's say that 20 per cent is——

Q. Isn't it a fact that in the early part of July, when Mr. Brewer was informed you people were insisting that he should operate from July 1, 1947, on the old franchise basis, that he told you he was through? A. Absolutely not.

Mr. Bernard: That is all.

Redirect Examination

By Mr. Rankin:

Q. Mr. Hilts—— A. Yes.

Q. ——the defendant has challenged this franchise contract on the basis that its operation is unfair. You have, on cross-examination, indicated to the Court that it was better to go back on the franchise than it was for him to proceed on the dollar-take-home dollar-pay-company basis?

A. Yes.

(Testimony of Harold W. Hilts.)

Q. I wish you would explain just the benefit that accrued to Mr. Brewer or would have accrued to him had he seen fit to go on with the agreement that he had made.

The Court: I have got to get to the main issue in this case. I will hear Mr. Brewer tomorrow morning, so I will ask you to lay that aside. As I see it, this revolves around the [183] question of credibility, whether this contract was canceled or not. You have one more witness, your man Fisher, who will testify along the same line?

Mr. Rankin: Your Honor, if I have to select as between the witnesses, I would rather select another one. I would like to use Mr. Fisher, too, but I won't insist.

The Court: Have you another witness?

Mr. Rankin: Yes, your Honor, I have several witnesses.

The Court: On this key question of credibility, whether on June 17th, or whatever it is, this man said that he was all through.

Mr. Rankin: No. There were three people present Brewer, Hilts and Sibert.

The Court: Tomorrow morning, Mr. Bernard, be prepared to put your client on and cover what has been covered here today.

Mr. Bernard: Very well, your Honor.

(Thereupon, at 5:15 o'clock p.m., an adjournment was taken until Wednesday, January 21, 1948.) [184]

Court reconvened at 10:00 o'clock A.M.

Wednesday, January 21, 1948

CHARLES P. BREWER

one of the defendants herein, produced as a witness in his own behalf, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Bernard:

Q. Where do you reside, Mr. Brewer?

A. At 4929 N. E. 28th Avenue, Portland, Oregon.

Q. When did you move to Oregon?

A. I moved in April, 1946.

Q. Did you purchase this property with the idea of being a permanent resident here?

A. I did.

Q. Where did you live prior to coming to Oregon? A. In Oakland, California.

Q. How long did you live there?

A. Three or more years.

Q. Mr. Brewer, in a general way, what was your occupation and business experience before you became connected with the Paramount Pest Control Service?

A. I was a mechanic, automobile and heavy-duty mechanic.

Q. Will you relate to the Court how you happened to become associated with the Paramount Pest Control Service? [185]

A. Well, my wife, Mrs. Brewer, and the lady that is now Mrs. Sibert were friends. She used to

(Testimony of Charles P. Brewer.)

live next door to us. She had begun to work for the Paramount Pest Control Service and through her I was introduced to Mr. Sibert and that is the way I first got acquainted with Mr. Sibert.

Q. Did you make application to the Paramount Pest Control Service for employment?

A. Not at the time. I never made application until after Mr. Sibert had asked me for two or three months to go to work for him.

Q. About when was that?

A. Oh, I would say that was some time—I went to work for him some time around February.

Q. 1946? A. Right.

Q. Did you own your home in Oakland?

A. We did.

Q. Will you tell the Court what you did for the Paramount Pest Control Service between the time you went to work for them and the time you came to Portland, going into whether or not any instructions were given you and things of that kind?

A. I went out from the office with Carl Duncan, who was then their instructor, and I went around to different accounts, saw how he mixed his bait and put it out for rats, also mice and cockroaches. I was on one job with him where he sprayed two [186] beds for bedbugs.

After about a week of that, close to a week, then I went out selling, by myself, to try and learn what there was about selling, and then I worked at that about a week, and then I went out alternately with one man or another on trouble checks, where they

(Testimony of Charles P. Brewer.)

were having trouble. I went along with them to see if I could help out or learn anything.

Q. You said Duncan would go out and mix bait for rats. How would that be done?

A. Well, as a general rule, the way of killing rats at that particular time was to cut apples and carrots, or vegetables with meat in it, small pieces, into small pieces, sprinkle on a little poison and go and put that out in the corners, behind boards or in places where rats would run.

Q. Was any other information given you as to how to mix any of these baits?

A. No, there wasn't. I asked Mr. Sibert for information so I could study up and find out what chemical I was handling or what I was doing and Mr. Sibert said I wasn't going to take an examination in the State of California and I didn't need to know all that technical knowledge.

Q. There have been introduced in evidence here certain exhibits which I believe you have examined outside the courtroom here.

A. I have.

Q. Was any information ever given to you as to any of the [187] formulas that go to make up any of the products represented by any of these labels?

A. No technical information was ever given me. They did tell me that on their mouse grain we had to take birdseed and sprinkle some poison on it and stir it up.

Q. No. 5-10, ant syrup; was any information ever given you as to that?

No.12170

United States
Court of Appeals

for the Ninth Circuit

PARAMOUNT PEST CONTROL SERVICE, a
corporation,

Appellant,

vs.

CHARLES P. BREWER, individually and doing
business as Brewer's Pest Control, ROSALIE
BREWER, his wife, RAYMOND RIGHT-
MIRE, CARL DUNCAN and EARL MER-
RIOTT,

Appellees.

Transcript of Record

In Three Volumes

VOLUME II.

(Pages 267 to 537, inclusive)

Appeal from the United States District Court
for the District of Oregon

FILED

APR 4 - 1949

PAUL P. O'BRIEN,
CLERK

No.12170

United States
Court of Appeals

for the Ninth Circuit

PARAMOUNT PEST CONTROL SERVICE, a
corporation,

Appellant,

vs.

CHARLES P. BREWER, individually and doing
business as Brewer's Pest Control, ROSALIE
BREWER, his wife, RAYMOND RIGHT-
MIRE, CARL DUNCAN and EARL MER-
RIOTT,

Appellees.

Transcript of Record

In Three Volumes

VOLUME II.

(Pages 267 to 537, inclusive)

Appeal from the United States District Court
for the District of Oregon

(Testimony of Charles P. Brewer.)

A. The information—the only information I had on ant syrup was that Paramount was buying their ant syrup, and that is the only ant syrup I ever saw with Paramount at the time.

Q. So that there will be no question about this, will you run through these exhibits hastily, not taking too much time, Exhibits No. 5-1 to No. 5-24, and tell any information that was ever given to you by anybody connected with the Paramount Pest Control Service as to any of these concoctions? Make it as rapid as possible.

A. The sprays that I see here is Fly Spray F2, Bed Bug Spray—I was told to buy those from the Shell Oil Company and use them. Fungus, I never saw—never saw any of their products.

Q. Refer to the exhibit number, please.

A. No. 5-6, Insect Powder, that was mixed by them, and I never had the formula for mixing it.

Moth Crystals, to my knowledge, was bought on the open market. I never bought any Moth Spray F2.

Phosphorous Paste, they bought in five-gallon lots from jobbers. [188]

Rat Kilzum; Mouse Grain—Most of them are zinc phosphide poisons only that were mixed up as we went along or mixed them up on the job under a warehouse, for instance.

This Roach Powder with—I can't even pronounce it, Exhibit 5-17. I don't know anything about that.

(Testimony of Charles P. Brewer.)

Sodium fluoride is bought upon the open market. Exhibit 5-19.

The Sodium Fluoroacetate labels are bought, the Paramount labels that I have seen on their cans of 1080, which is the common term for Sodium Fluoroacetate, which is bought from the Monsanto Chemical Company in St. Louis, Missouri.

Termite and Fungus Mixture—That is 5-21. Sodium Fluoroacetate (5-22), and Exhibit 5-21 is an envelope I never saw.

Q. Outside of the information that you acquired from watching Mr. Duncan put out this bait for rodents, was any information ever given to you about any of the formulas and processes of Paramount Pest Control Service?

A. Not to my knowledge was any technical information given.

Q. Was there any other information, technical or otherwise, about their formulas?

A. No, not formulas.

Q. Jumping for a moment to the time that you went into business for yourself in August, 1946, have you in the conduct of your business—I mean August, 1947—used any of these products [189] or formulas of the Paramount Pest Control Service?

A. No, I have not.

Q. Where have you bought the things that you have used to carry on your business?

A. I bought them from different drugstores, from different drug concerns, such as McKesson-

(Testimony of Charles P. Brewer.)

Robbins; some articles like mouse traps, and all, I bought from Chown Hardware, and spots of that kind.

Q. Did you retain, when you went into business in 1946, any of the formulas or products of Paramount Pest Control Service?

A. You mean August 1st, 1947?

Q. Yes. A. I did not.

Q. Coming back now, under what arrangement did you come to Portland?

A. Under the arrangement of \$250 a month salary.

Q. There has been testimony in the case that; at some time, in California, you were shown a copy of one of these franchises. What is the fact as to that?

A. I didn't see a copy of the franchise. I knew that there was a franchise that they did give to different men in the territories where the amount of business would support a franchise.

Q. Did you have any discussion with anybody down there about a franchise? [190]

A. Yes, I talked with Mr. Sibert about one. It was a lengthy conversation and he told me that the Portland territory was in the red and that he would send me up here as manager and, when this business got up to \$4,000 to \$5,000 a month, it would be enough to support itself, and then I would have a franchise.

Q. In the meantime you received what?

A. \$250 a month salary.

(Testimony of Charles P. Brewer.)

Q. What date did you come to Portland?

A. I think I entered the State of Oregon on about the 8th day of April.

Q. Who came with you?

A. Harold Hilts.

Q. What was done when you came to Portland?

A. Well, we got a room, I believe, at the Roosevelt Hotel or the Congress Hotel—I stayed in several the next few months; I don't remember which was which. Harold Hilts attended to the business end of it, as far as I know. In fact——

Q. What do you mean, the business end of it?

A. He went out and talked to the former manager and got the books of the company to pull and audit or something. I stayed around the hotel. Mr. Glenn Fisher arrived up here around the 9th or 10th of April, and they called Mr. Taylor, the former manager, in for a conference and fired him. Mr. Fisher did this. Then Mr. Harold Hilts showed me the books.

Mr. Fisher went back to California immediately after [191] that; in fact, that day; and Harold Hilts showed me how the books were handled, what they looked like, what different books there were, that evening until eleven o'clock, and the next morning he showed me again, to the best of his ability, and the best I could learn, what was going on. Then he took the plane back that day for San Francisco.

Q. Did that leave anybody here for the Paramount Pest Control Service except yourself?

(Testimony of Charles P. Brewer.)

A. There was one man, Ray Warmuth, that was working for them at the time. It seems he was working part time. I don't know just what the arrangement was. I saw him three or four times during the month of April. That is all I saw him.

Q. Did they have an office?

A. Not an office; they had a call office where phone calls could come in, and Hilts had brought down the books and typewriter and office paraphernalia, all of that, this, that and the other, to the hotel room and left it there with me.

Q. You started in to operate from the hotel?

A. I was in the hotel until I could find an office.

Q. When did you find an office?

A. About May 1st.

Q. Did you sign up a lease?

A. No, there was no lease on the office. I was offered a lease, but I never signed one.

Q. You did sign a lease on the warehouse? [192]

A. I did.

Q. Yesterday counsel asked Mr. Sibert whether or not you had violated any provisions of the franchise and he said you had taken this lease in your name. Will you explain that to the Court?

A. The lease was made out to Charles P. Brewer, doing business as Paramount Pest Control Service.

Q. Why did you make it out that way?

A. That was the understanding as to who owned the business and how it was named, and my insurance has been ordered in that name, and that was

(Testimony of Charles P. Brewer.)

the name. Our insurance was in the name of Charles P. Brewer, doing business as Paramount Pest Control Service.

Q. Who had ordered that insurance?

A. That had been ordered from the Oakland office, through their agent in Oakland.

Q. That was prior to the time this corporation had been organized, was it?

A. No, they had been organized at the time, because my insurance was dated September 1, 1946.

Q. Where were the poisons and things kept when you first started in?

A. What I did not have in the hotel, which was not much, was out to Taylor's home when I arrived here. They wanted it out of there immediately. We had to move it to Ray Warmuth's garage. It was right on the sidewalk, and had no doors to it, and the [193] kids were playing in it and causing trouble, and I tried to find a warehouse for it and I finally got it into Crosby's Garage until I could find room in a building where I could locate it, other than in somebody's personal garage.

Q. You have testified you were to be paid \$250 a month until business got to, you say, about \$4,000 or \$5,000 a month?

A. I was.

Q. At any time, up to the time you severed your connection, did the business reach that volume?

A. It never did.

Q. What was the volume of business in the year from July 1, 1946, to June 30, 1947, in round figures?

(Testimony of Charles P. Brewer.)

A. Well, I don't know the division of the entire one year, but the thirteen months, the entire time of the franchise, it hit around \$35,000, in round figures.

Q. Did you put any money in the business when you first started in here?

A. Yes, I opened the bank account at the First National Bank with \$1,000 of my own personal money to carry the payroll and expenses until it would get some money into the organization.

Q. When did Mr. Duncan come up?

A. The first time he came up was May, around May, somewhere around May 10th.

Q. What did he do while he was here?

A. He trained three days—He was here around eight to ten [194] days in Oregon, but he trained Rightmire three days and then he left here on the Eastern Oregon service run and serviced through up the Columbia River to the Idaho line and back through Burns and Bend, Oregon, and back into Portland.

Q. Then, when did he come later?

A. I believe it was in October or November, the next time he came up.

Q. What did he do from that time on?

A. He was here with me, training men in the southern part of the state that I couldn't go down there and train. He was down there for two weeks or three weeks. I don't know just the exact time. He went from there up to Washington and he worked up around Spokane, Washington, for the

(Testimony of Charles P. Brewer.)

Paramount Pest Control Service for a period of, I don't know, two weeks to a month or six weeks. I don't know.

Q. By the way, there were some magazines marked as exhibits in this case, purporting to be devoted to insect control and so forth. Those are not put out by the Paramount Pest Control Service, are they? A. No, they are not.

Q. Are they ever sold to the public?

A. They are sold to the public.

Q. In dealing with these other people from whom you buy in your business, can you get data from them as to insect control and rat control?

A. Oh, yes. The Zehrung Chemical Company will give you any information you want on the control of any of them insects.

Q. Can you tell the Court, in round figures, about how many new accounts you procured in the thirteen months you were with Paramount Pest Control Service?

A. I would say between four and five hundred accounts.

Q. About how many accounts did they have when you came here?

A. I would say, not calling Safeway Stores as all individual ones, I would say somewheres around 100 to 150.

Q. Was there, at any time, any complaint made to you by anybody connected with Paramount Pest Control Service as to your conduct of their business in the State of Oregon?

(Testimony of Charles P. Brewer.)

A. No. They always thought that I was doing a wonderful job up here, and bragged on this as being one of the best territories in the organization.

Q. How did it happen, Mr. Brewer, that you transferred from this \$250 a month to the signing of this franchise?

A. Mr. Sibert came up here the latter part of June, I would say after the 25th, some time, and he said—he stayed out at our home; that was a common occurrence between us—and he told me at my home that he was going to let me have a franchise. I said I did not want any part of a franchise; the business is in the red; and I could not support a franchise, and he said, “I have got to dump it.” He said, “I have got to dump the business. We are incorporating in the State of California the first day of [196] July, and the State of Oregon is operating in the red, and we cannot incorporate if we take a portion of our territory operating in the red. He told me that I would have to take a franchise out, or I was out at that time.

Q. At that time had you bought your home in Oregon? A. I had bought it in Oregon.

Q. And you had sold your home in Oakland?

A. I had sold my home in Oakland and moved up here, all of our furniture up here and——

Q. In operating under this franchise, did you have anything to do with fixing the prices of the merchandise that you had to buy from the company?

A. None whatever. If we ordered anything from Paramount, they sent us a bill for it.

(Testimony of Charles P. Brewer.)

Q. Did you need an automobile in the transaction of business? A. I did.

Q. Did you request them to furnish you one?

A. I asked Mr. Sibert about an automobile, if they could help me out in getting one, and he said it was my business; if I wanted an automobile I would have to go and buy it, so I did.

Q. Did you have an automobile of your own?

A. I had one of my own, personally.

Q. Was that used in the business?

A. It was used by me in the business.

Q. Was anything furnished, in the operation of this business, [197] by the Paramount Pest Control Service?

A. Well, if I needed some sodium fluoride, I would order from them, but if I wanted some 1080 I would write them and tell them to send me some, which they did, and to bill me for it. They sent me any office stationery or anything I needed, with a statement for it, of course, from themselves or from the printing company.

Q. You say that the gross income for the thirteen months was \$35,000. Can you tell the Court, in round figures, the expenses of operation, exclusive of any moneys sent to the Paramount Pest Control Service on the franchise?

A. It was somewhere around \$29,000 to \$30,000, was the expenses.

Q. That would leave a net profit of \$5,000?

A. Approximately, yes.

(Testimony of Charles P. Brewer.)

Q. If you had to pay Paramount Pest Control Service 20 per cent of \$35,000, you would be \$2,000 short?

A. I would have been.

Q. When did you first discuss with anybody connected with Paramount Pest Control Service any change in the terms of this franchise?

A. Right during the time, after Thanksgiving in November, I talked with Mr. Sibert in the Oakland office. I told him that the business could not be operated on a 20 per cent gross to them; that it would cost me more and everything else, and I would not operate that way. [198]

He told me that he would try to get it back to where it would be 50-50 for us, and I said that would be all right, and he called Harold Hilts into his office, or Mr. Hilts walked into the office, one or the other, right at that particular time, and Mr. Sibert told Hilts that he could make that change, whereas it would be a 50-50 proposition, even on the net profits—I don't remember that word "net profits" used—but it was a 50-50 proposition, and that they would change it over to that.

Q. Was anything said or discussed as to how long that would run or whether it would terminate at any period?

A. Mr. Sibert asked me if I wanted it to run until the first of the year, for one year, or when, and I said, "As far as I am concerned, it can run from now on, as long as the contract is in force," and he said, "All right. If that is the way you

(Testimony of Charles P. Brewer.)

want it," and I said, "That is the way I want it," and he said, "That is the way it will be."

Q. He said he had some talk with you up here in September about this thing and had forgotten to report it to those men until December. Did you ever discuss it with Mr. Hilts at all?

A. Not to my knowledge was anything discussed in September.

Q. When, with reference to that time, was there any question or discussion with anybody as to this change in the terms of the franchise?

A. The only time anything was said about it whatsoever was when Mr. Hilts pulled up an audit statement from the books—pulled [199] an audit statement from the books—around September 13th or 14th and presented it to me.

Q. Everything, as far as you knew, went along satisfactorily until some time in March?

A. It was.

Q. When did Mr. Hilts see you in March?

A. I don't remember whether it was the 13th or 14th. It was probably the 13th or 14th.

Q. Where was it?

A. At the office in Portland here.

Q. Tell the Court what happened here at that time, at that meeting with Mr. Hilts?

A. Mr. Hilts pulled up a balance sheet or rough draft of the books and told me that I owed the Paramount Pest Control Service \$994 for January and February's operation, and it seemed to me—it made me so mad I couldn't talk.

(Testimony of Charles P. Brewer.)

I turned to my wife and I said, "Make them out a check." She looked at me as though I was silly and I said, "Make out the check," and she made it out quick and I handed it to him.

A few minutes later I got my things and I said, "I will drive you to the airport," and on the way to the airport I told Hilts that I was completely done with Paramount Pest Control Service.

Q. Was that this check for \$994.25?

A. It is.

Q. Now, this audit that he showed you as a basis for the money [200] they were claiming you owed, was that audit made on the 50-50 basis, or was it made on the 20-80 basis?

A. It was made on the 20 per cent of gross business done.

Q. Can you turn to Exhibit 29 in that bunch of exhibits? That is the letter of March 15th from Harold Hilts.

A. I have it.

Q. Do you have it front of you?

A. Yes. This is the one he sent me.

Q. Can you tell when Harold Hilts left Portland?

A. He left here on Friday evening, around four or five o'clock in the afternoon, rather.

Q. That would be on March 13th?

A. I believe the 13th or 14th. I have no idea for sure.

Q. I think the calendar will show March 13th. It was at that time you told him that you were through?

A. It was.

(Testimony of Charles P. Brewer.)

Q. I think the 14th was Friday. I think the calendar shows 15th was Saturday. When did you receive this letter, this letter which is marked Exhibit 29?

A. I received it at nine o'clock in the morning at my home, airmail special delivery.

Q. Sunday morning?

A. Sunday morning.

Q. The third paragraph reads:—The first paragraph, I should say: “Enclosed is a statement of your account for 1946, also [201] January and February of this year.

“You will note that this splits everything across the board for 1946 and we both come out with \$1,479.65 and you still have your \$1,000 investment in the business.

“For January and February there is a net profit of \$1,016.55 with the franchise out of it, now you have drawn \$512.22 for both months; if we take \$512.22 like you did that will be your franchise for January and February.”

Did that differ from the audit that he had sprung on you on the 12th or 13th?

A. It absolutely does.

Q. Why did you go on then with the business, after you had told him you were all through?

A. Because he wrote me this letter and explained in here that they would split across the board, and that Sibert had tried to explain it to him just before he came up here but he didn't understand. That is what it says here.

(Testimony of Charles P. Brewer.)

Q. All right. When was the next discussion you had with anybody about the way the money was to be divided between you?

A. I think maybe in April. Hilts and I may have mentioned it some, of course, around the office there, but there was no great discussion on it at that time.

Q. When was there any discussion to the point that there was any difference between you?

A. The first difference as to moneys or anything was down in [202] Oakland, right at the last, the controversy of June.

Q. Did you see Mr. Hilts? He said he saw you between the 17th and 20th of June.

A. Why, I saw him the 17th of June. He and Mr. Sibert came here but he did not pull an audit of the books at that time. He had a recap of the business done, the income and expenses. He made out a blank statement to turn in to the bank and then he and Mr. Sibert went on to Seattle. I gave Harold Hilts a key to the office and files so that he could come into the office and pull an audit of the books while I was in California.

Q. In other words, an audit was not made——

A. An audit was not made until after I had left Portland.

Q. You said a bank statement, a financial statement, was prepared for the Bank of California. Who prepared that?

A. Mr. Hilts prepared it.

(Testimony of Charles P. Brewer.)

Q. I am referring now to Exhibit 77. I will ask you who did the typewriting?

A. Mr. Hilts did that.

Q. What—For what purpose was that exhibit prepared?

A. To present to the bank to establish credit for me so I could borrow money from the Bank of California.

Q. For what purpose?

A. To give to him.

Q. When had anybody requested that you borrow money to pay on your indebtedness to them?

A. Mr. Sibert had called me some time the latter part of April or the first of May from Seattle and told me that he was in a pinch for money and would I please go and borrow some money and give to him. He wrote me a letter from Oakland shortly thereafter, which is in the files at the office, asking me to go down——

Mr. Rankin: Just a moment. The letter is the best evidence, of course.

A. All right.

Q. (By Mr. Bernard): Never mind. Just a moment, please. This Exhibit 77 was prepared by Mr. Hilts? A. It was.

Q. For the purpose you have indicated?

A. Yes.

Mr. Bernard: I offer this in evidence as Defendant's Exhibit No. 77. The defendants' exhibits have not been offered yet.

The Court: Is that a new document?

(Testimony of Charles P. Brewer.)

Mr. Bernard: No; it is a pre-trial exhibit.

Mr. Rankin: It was reserved—a number was reserved at the pre-trial for it, but we have not seen the exhibits before this morning. I won't take the time now, but I want to reserve our objections until later. You want to use it?

Mr. Bernard: I want to use it, yes.

The Court: Admitted.

(Financial statement of Charles P. Brewer to [204] the Bank of California thereupon received in evidence and marked Defendants' Exhibit No. 77.)

Q. (By Mr. Bernard): I notice this is made out in the name of Charles P. Brewer and it says, "Cash in Bank of California, \$75.10." Was that the bank account that you handled the business through?

A. That was the bank account, the bank balance at the end of May.

Q. "Accounts Receivable, \$3,624.56." Were those amounts owing you in your operation for the Paramount Pest Control Service?

A. That was due and payable on the books.

Q. "Real estate and buildings, \$5,250." What real estate and buildings were represented?

A. It would be my home.

Q. "Autos and trucks, \$1,836." Does that include your automobile?

A. My personal automobile and Plymouth coupe that I bought.

(Testimony of Charles P. Brewer.)

Q. When did you buy your personal automobile?

A. In October, 1942.

Q. "Other assets, personal furniture, \$2,100."

Is that the furniture at your home?

A. That is.

Q. "Accounts Payable, \$2,759.63." Is that the money that you owed Paramount Pest Control Service?

A. That is. [205]

Q. Was that money that they wanted you to borrow to pay? Was that the account, \$2,729.63, that they wanted you to pay?

A. It is.

Q. Did you borrow money from the Bank of California?

A. No, I didn't.

Q. Why not?

A. Because I would not go into debt for the Paramount Pest Control Service from California. Ted told me he would never press me for money unless this office could pay off; until it could pay off he would not press me for money, and I was not going to go into debt like Osborn and a lot of other managers up here had, and go broke because of it.

Q. When they informed you—When were you informed, rather, that you were going to be required to go back on the 20-80 basis as of July 1st?

A. Mr. Sibert told me that just prior to July 1st.

Q. Where?

A. I don't remember the exact spot, whether it was at his home or in his office in Oakland, California.

Q. What were you told about that?

A. I was told that I was going back on the 20 per cent basis; that he had worked out on a piece of

(Testimony of Charles P. Brewer.)

paper a budget whereby I could operate and make more than \$850 a month and the firm \$600, and that would be a profit on a \$2500-a-month business. I couldn't see where I could make that much by traveling clear to [206] Boise, Idaho, and below Klamath Falls, Oregon.

Q. What did you tell him?

A. I told him it would not work and that I would carry the business for the month of July.

Q. Did you tell him what you would do at the end of the month of July?

A. I didn't tell him right then what I would do. I told him I would carry the business for the month of July.

Q. Did you agree at any time to go back on the 20-80 basis?

A. I never agreed with them. They put me right back on the 20-80 basis.

Q. After you wrote this letter of resignation, did Hilts come up here?

A. Yes, he came up here around the first day of August.

Q. Will you tell what you did with Hilts as to turning over to him any of the property of the company that you had been using in the operation of this business?

A. Mr. Hilts and I went down to the office and got paper and we started in to take an inventory of the supplies around the office. We were both writing down, so we decided to make that simpler, and

(Testimony of Charles P. Brewer.)

he wrote it down and I would call it off, and we would check it.

I called off all the supplies and equipment around the office. Then we went out to the warehouse, went in there, at Fifteenth and Marshall, and took an inventory of all supplies [207] and equipment there.

I told Hilts that there was a spray trailer and spray machine at my home, and we would go out there and get those, and we went out there and he saw the spray trailer. I told him what it cost and where it was. The spraying machine I couldn't find. It was not there, and there was a few little items—a little bit of bait or maybe a little sugar or something like that, that had been laying around. We gathered that up and I gave it to Hilts, and that was noted in the inventory.

I told Hilts I would either get them a spray machine or I would find it, and the spray trailer they could have had.

Then, the next day, or that evening, Hilts had gone into the warehouse and taken a spray machine or something out of the warehouse, and I don't know whether he had done a job with it or not, but when I found out about it through the management of the building I told him they were not allowed in that office any more until I had a definite statement because every time I asked, "What kind of a settlement are you going to make with me?" he said, "You know we will do just what is right by you." I said, "What kind of a settlement?" And he said,

(Testimony of Charles P. Brewer.)

“We will settle like we said we would,” and that is all he would say. I locked up the warehouse until they would make some kind of a definite statement as to the settlement.

Q. These supplies, equipment and things you turned back, had you already been charged for them by the company? [208] A. I had.

Q. All right. Going to this settlement that you wanted to have——

A. That was on a Saturday, I believe. I believe it was Saturday afternoon. I am not sure of the exact time, but Mr. Fisher, Wendy Fisher, and Harold Hilts were there at the time. I told Mr. Celsi that they were not allowed in the building until I said so. Mr. Celsi told them that he had leased the building to me and when I said they could go in, they could. I believe it was Saturday afternoon. They were locked out of there until Monday.

Monday Mr. Sibert came up and he argued back and forth about forty-five minutes before he definitely said he would settle with me, pay me any moneys due and payable to me, and pay me for my supplies and equipment.

Q. Did you turn everything over to him?

A. Turned everything over except the spray trailer. It was hauled out and parked on the street. I left it there for them to come and get it any time they had a place to park it. The one spray machine—I told them I would bring it down to him. I didn’t have it—it was out; one of the boys had it; and I got it later, and I didn’t take it down to them.

(Testimony of Charles P. Brewer.)

Q. Did you make a demand that they have an audit at that time?

A. I told Mr. Sibert that if these books were audited by a Portland accounting firm and we settled on that basis, then he [209] could have the warehouse and the supplies and the rest of it, but that they could not take these books to California for an audit down there.

The next morning Mr. Sibert called in Mr. Young, I believe, of Jones and Young, an accounting firm, to audit the books and before he could get started Mr. Sibert said something to him and he got mad. He called up Sawtelle, Goldrainer & Company, and they went down and completed an audit of the books.

Q. That has been known in these proceedings as the Sawtelle Goldrainer & Company audit?

A. Yes, sir.

Q. Exclusive of this \$1,000 that you put into the business, what were your drawings from this company for the thirteen months that you were with them?

A. Other than getting back the thousand dollars that I put in to carry it forward and the expenses that was paid, I drew thirty-two hundred and a few dollars.

Q. Some testimony was given in this case that they paid for you to take an airplane trip to California. Do you recall that?

A. They did not pay for that airplane trip. It was around the 25th day of June. Mr. Sibert—

(Testimony of Charles P. Brewer.)

Mr. Hilts and I had called him. He did make a reservation so I could go on the same plane Mr. Sibert went on, but Checks numbered 398, 399 and 400 show where I drew altogether \$200 just a day or so before I left. I used that to buy my tickets and met Mr. Sibert at the airport [210] with my daughter and we got on the plane and flew to California and I bought those tickets.

Q. Mr. Brewer, about when did you decide to go into business for yourself?

A. It was after the 15th of August and somewhere around, I would say, around the 20th or 25th, of July, pardon me.

Q. There is an exhibit here showing that your wife first filed an assumed name certificate and later you did. Why was it that your wife signed the first one?

A. I was still working with Paramount and I was out helping to service calls and continuing to work for them, and I did not feel like taking the time to go and do it.

Q. Did you attempt to devote your best efforts to the Paramount Pest Control business up to the first of August?

A. I devoted every minute to Paramount up to August 1st.

Q. Mr. Hilts testified that he saw you at the Roosevelt Hotel July 31st. Do you recall that?

A. I do not recall for sure whether he did or not.

(Testimony of Charles P. Brewer.)

Q. Well, he said in substance that he asked you what had happened and you said you could not make a go of it, and that Rightmire was quitting, wasn't going to stay in the extermination business, that you promised to give him Rightmire's address and never did. Does that call the matter to your attention?

A. There was a meeting of that kind.

Q. Tell what your recollection is of what went on? [211]

A. I don't remember how I happened to go to the hotel. I do remember now that he did ask me for Rightmire's address. I told him I would get it from the office. I didn't find it at the office and I didn't call him back. He called me up at my home and asked me what the address was. I didn't know the name of the street. I knew where it was but I didn't know the name of it, nor the address; and the next day, after the inventory was taken, and we were out to my home, he asked me where Ray lived. I told him I didn't know his address but I knew where it was, and he said, "Will you draw me a map so I can find it?" And I said, "Yes," and I took a piece of paper and drew out a map to show him where the Safeway Store was on the corner and showed him the house on the map, where it was, Ray Rightmire's home.

Q. There is some evidence that shortly before the 1st day of August there were three cans of this 1080 returned from Seattle.

A. There were two cans returned to me from Seattle, because Mr. Osborn had requested two cans

(Testimony of Charles P. Brewer.)

about a month before that, that he was in need of some what is known as 1080 in a hurry and would I ship it to him, and I shipped it to him airmail that day, and in July some time I wrote Mr. Osborn and told him I wanted the two cans or the amount that I had paid for them and he sent them back to me, and when I turned over these supplies to Paramount there were at least three cans of 1080 on the shelf for them. [212]

Q. Then, from August 1st on, you did not use any property of any kind or character belonging to Paramount Pest Control Service in connection with your own business?

A. I never used that spray, that "Hi-Fog" nor the trailer.

Q. Or any other of their products?

A. None of their products whatever.

Q. Did you retain in your possession any lists of their customers? A. I did not.

Q. How did it happen that Rightmire and Duncan came to work for you, and Merriott, too?

A. Well, Mr. Rightmire was hired by me after being interviewed by Mr. Sibert.

Q. I mean, by you after August 1st. How did you happen to hire Duncan, Rightmire and Merriott to work for Brewer's Pest Control?

A. I offered Ray Rightmire a job August 1st or thereabouts, and he came to work for me. I offered Earl Merriott a job around August 1st and he came to work for me, and around the 18th or 20th

(Testimony of Charles P. Brewer.)

or somewhere around there I offered Carl Duncan a job, as he said he had to work for a living, so he went to work for me.

Mr. Bernard: I think you may cross-examine.

Cross-Examination

By Mr. Rankin:

Q. Referring to the poisons that you described, from the exhibits that have been admitted in evidence, you say they are all those poisons, common poisons, you can buy on the open market, anyplace?

A. Most of them are that I know of.

Q. You put quite a limitation on your answer. How many of them do you know of?

A. These that have Paramount labels on them I couldn't buy on the market. You can buy a similar product but not these labels, but at least the ingredients, as I read the ingredients here, on the open market.

Q. When you say "as I read the ingredients," do you refer to the active or inert ingredients?

A. I mean the active.

Q. You know enough about pest control to know that active ingredients are required, at least by the laws of Oregon and California, to be placed upon the can or the container?

A. It is according to whether you are selling or using. We do not sell. We do not have labels for any poisons that we handle because we do not sell poisons.

(Testimony of Charles P. Brewer.)

Q. Would you answer my question, please?

A. What was the question?

(Question read.) [214]

A. To my knowledge, they are not required in the State of Oregon to be placed on the can unless it is for sale.

Q. If you manufacture it, even for use in your own business, labels are required to be placed on the cans?

A. To my knowledge, it does not.

Q. Does it in California?

A. I don't know the California law.

Q. Your statement was you could buy on the open market—I recall this instance—moth crystals: Can you buy the same poison in moth crystals on the open market as it is put out by Paramount Pest Control Service as "Moth Crystals"?

A. I don't know what Paramount puts out. I know I can buy Paradichloro Benzene Crystals on the open market.

Q. Do you know any of the formulas under which Paramount puts out any of these poisons as they appear on the labels? A. I do not.

Q. So you could not honestly state, then, could you, that you can buy this same product on any common market?

A. I can buy the active ingredients on the common market.

Q. You mean by that you can buy ingredients like those that are used and named in the Paramount labels? A. Yes.

(Testimony of Charles P. Brewer.)

Q. Now, when did you get the 1080 from Mr. Osborn in Seattle, Washington?

A. It was some time, I believe, after the 15th day of July, 1947. [215]

Q. You got two cans?

A. I got two cans, yes.

Q. You claim that they were redelivered to Paramount? A. They were.

Q. Who received them?

A. Harold Hilts, in the inventory of the equipment in the warehouse at the time.

Q. Who delivered them to him?

A. I did. They were sitting on the shelf and I called them off to him, and he saw that they were there.

Q. Have you at any time since July, 1947, used 1080? A. I have.

Q. Where did you get the 1080?

A. I got it from the Monsanto Chemical Company.

Q. Direct?

A. I got one can from the Fish and Wild Life, and I ordered my others from Monsanto.

Q. Have you got any communication that will show you ordered it from this company?

A. I don't have with me.

Q. Have you got any communications anywhere?

A. I got a letter from Monsanto, yes. I don't know just what you mean by order. I wrote them and told them I wanted it and they wrote me back

(Testimony of Charles P. Brewer.)

instructions just how to get it, and I have a copy of my insurance made out by the insurance company to [216] Monsanto for it.

Q. Just answer one question at a time. Have you in your files anywhere this order to Monsanto for 1080?

A. No, I wouldn't say that I have. If I wrote them a letter to send me some, I didn't keep that letter in my files.

Q. You don't keep any record of your orders of poisons as deadly as 1080?

A. I don't need to keep a record of the order.

Q. I didn't ask you whether you needed to or not. I asked, did you?

A. I wouldn't say for sure. I don't believe I have.

Q. Have you got any letters or anything of record to show whether or not Monsanto Chemical Company sent you any poison known as 1080?

A. What do you mean, record?

Q. Don't you know what a record is after you have been through the preparation of this case? I mean a paper or any statement, typewritten, or written by hand, that says, from this chemical company, that "We are sending you so much of the poison commonly known as 1080?"

A. I have no such thing that I know of.

Q. Now, you say you got a can from Wild Life?

A. Yes.

(Testimony of Charles P. Brewer.)

Q. How did you get that can?

A. I went up and asked them to give me a can of it. [217]

Q. Where are they located?

A. Their main offices are located in the Weatherly Building.

Q. Here in Portland? A. In Portland.

Q. When? A. The first day of August.

A. I would not remember his name.

Q. Do you mean to tell this Court you can buy a can of 1080 from Wild Life? A. I can.

Q. How much did you pay for it? A. \$8.00.

Q. \$8.00 for a can?

A. No, \$4.00 for one can. I meant one pound when I said one can.

Q. You got one pound, now. Your statement is now that you got one pound of 1080 from Wild Life? A. I did.

Q. What? A. The first day of August.

Q. What year? A. 1947.

Q. And you paid \$4.00 for that can?

A. I paid \$8.00 for that pound.

Q. \$8.00 for that pound? A. Yes. [218]

Q. Did you put up any bond with them in connection with that purchase of it?

A. With Fish and Wild Life?

Q. Yes. A. No.

Q. They just sold it to you direct?

A. They have done that to several exterminators in the State of Oregon, including myself.

(Testimony of Charles P. Brewer.)

Q. Did you make any representation to them about your use of it?

A. I told them I was familiar with the use of it.

Q. And you did that for the purpose of serving customers of yours who had formerly been customers of Paramount Pest Control Service?

A. I did it to get poisons to serve customers of Brewer's Pest Control.

Q. Who had formerly been customers of Paramount?

A. Some who had not been.

Q. But some who had been?

A. Some who had and some who hadn't.

Q. Been customers of Paramount Pest Control Service? A. Right.

Q. You stated that the company was in the red, I mean, that Paramount Pest Control Service was in the red when you came here? [219]

A. That is what I was told.

Q. You do not claim the truth of the matter for yourself, then?

A. If it isn't, they lied to me.

Q. Who was it that lied?

A. Harold Hilts and T. C. Sibert.

Q. Did you make any effort to ascertain if it was true?

A. I did not pull an audit of their books to see if it was true.

Q. Did you make any effort to ascertain the condition of your company? A. Yes.

(Testimony of Charles P. Brewer.)

Q. For the two months after you came?

A. I don't understand that.

(Question read.)

A. Yes, it was in very bad condition.

Q. You mentioned Mr. Taylor. Do you know whether he had a contract or not?

A. I don't know anything about his relationship with Paramount.

Q. You spoke about Mr. Osborn had gone broke on his contract.

A. I don't know.

Q. You said that he had gone broke.

A. I said that they got him in debt.

Q. If I recall correctly, you used the word "broke."

A. Well, I don't know what their relationship was now, but T. C. Sibert asked me, after I made the trip to California in November, [220] to go to Seattle and see about it, that Osborn was taken back off his franchise and put on a \$250 a month drawing account, because he was over in debt, and Mr. Sibert asked me to go up there, which I did.

Q. You went up there? A. I did.

Q. Did you make a success of Mr. Osborn's business?

A. I didn't make any success of anything up there.

Q. Nor here either, did you? A. Yes.

Q. Is Mr. Osborn still with the company?

A. To the best of my knowledge, he is.

(Testimony of Charles P. Brewer.)

Q. You said, I believe, on your direct examination you had made no list of the customers that you had formerly served when acting as agent for the Paramount Pest Control Service?

A. I made no list from there, to take away from there.

Q. As a matter of fact, you took the books home, didn't you? A. I didn't.

Q. You took them home and made a list from them, both as to the account and as to the name of the patron? A. I did not.

Q. Where did you get the list that you compiled in your answer, when you identified 141 former customers of Paramount taken over by yourself?

A. What do you mean by list or listing? I took them from a list [221] that I made up from our books, Brewer's Pest Control.

Q. How did you know, then, that they were former patrons of Paramount Pest Control, unless you had some record? A. By memory.

Q. You remember 141 accounts of Paramount Pest Control Service?

A. What do you mean, remembered 141?

Q. I am just using that word. What did you mean by remembering?

A. You are asking me about the list that I made that you called for in the notice to produce?

Q. Yes.

A. Is that the one you are referring to?

(Testimony of Charles P. Brewer.)

Q. Yes.

A. I took those from Brewer's Pest Control books.

Q. How did you know they were also patrons of Paramount Pest Control Service?

A. Because we had been servicing them, according to my memory, over eighteen months period of time. If a name is called, I can at least remember the name.

Q. Will you now name the 141 former patrons of Paramount Pest Control Service?

A. If you will put the 141 names in front of me where I can see them, I can.

Q. You cannot remember them without you have aid from your own records?

A. I can't remember 141 names here at the present moment, unless [222] you put a list of people in front of me. Then I can call off those that we had serviced as Paramount.

Q. You had your own records when you did call off these names?

A. I didn't have to have my records. If I remember a name, I can——

Q. Then, the reason that you remember, if you do remember, that you had 141 names is because your business is comprised almost entirely of those patrons that you had served under the Paramount Pest Control Service?

A. No. A big per cent of our customers had never heard of Paramount Pest Control Service.

(Testimony of Charles P. Brewer.)

Q. What per cent?

A. I didn't figure the percentage.

Q. Do you mean to tell the Court that you do not know what percentage of your business was from these Paramount Pest Control people, and what percentage was not?

A. I don't know the percentage of what was formerly Paramount and what was not. I was not interested in percentages.

Q. Would you say that a majority of your customers were also customers of Paramount?

A. A majority of them.

Q. What would that amount to, between 80 and 85 per cent?

A. I would say no to that.

Q. Referring to the franchise, it is your position that the franchise went on as it was written until Thanksgiving in the [223] following November?

A. It did.

Q. Nobody made any change in it during that period of time?

A. None whatsoever.

Q. When did you first see the franchise, the form of franchise agreement?

A. Some time after the 25th of June, 1946, when Mr. Sibert took a franchise or a copy of some franchise that they had, to copy off one so that they could have it for me to sign.

Q. Did you read it then?

A. I read it, yes.

Q. You signed it when? How much later?

A. It was signed effective July 1st. I wouldn't know the exact date, somewhere between three and four days before that.

(Testimony of Charles P. Brewer.)

Q. Was it signed by Mr. Fisher at the time that you signed it? A. No, it wasn't.

Q. Did you see anything which was unfair in your contract at the time you read and subsequently signed it?

A. I saw everything unfair about it.

Q. Why did you sign it?

A. I was out of a job if I did not sign it, and I was in a strange town.

Q. Your position is that you claim you were forced to sign that? A. Practically, yes.

Q. Under duress? [224] A. Practically.

Q. Why didn't you plead you were under duress, if you were?

A. I did. He told me I would either sign it or else I was out of a job.

Q. Why didn't you plead it in your complaint here, your answer rather?

A. As far as I know, I did.

Q. Of course, you know you did not.

Mr. Bernard: I don't think counsel should argue with the witness. I object to it.

The Court: Go ahead.

Q. (By Mr. Rankin): When did you first consider that this contract was no longer an agreement that you had to live up to?

A. I first considered it as of no value whatever to me, or them, around July 25th somewhere, somewhere around there.

Q. What year? A. 1947.

(Testimony of Charles P. Brewer.)

Q. On July 25, 1947, that is about the date you sent in your resignation?

A. That is the date I sent in—around that date that I sent in this letter confirming my resignation.

Q. At that time you had come definitely to the conclusion that the contract was not one that was binding on you or Paramount?

A. I considered it not worth the paper it was written on.

Q. Did you so consider it in February or March of 1947? [225]

A. I did, at the time Harold Hilts told me I was going to have to pay 20 per cent.

Q. All right. Which time did you consider the contract of no validity, in February or March of 1947, or in July, 1947?

A. For about two days in March I considered it no good until I got that letter, explaining it, and then I considered it absolutely no good in July.

Q. For two days in March, 1947, you thought the contract was all right?

A. I thought their word was all right.

Q. How about the contract?

A. Their word modified the contract.

Q. Did you make any payments under this contract? A. Which contract?

Q. The one we will call the franchise.

A. I made three or four payments on it.

Q. The first one was when?

A. Around—I don't know the exact date, but somewhere around March 6th, I believe.

(Testimony of Charles P. Brewer.)

Q. Didn't you make your first payment February 6th? A. Maybe that was the date.

Q. That check is in evidence. That shows \$338 and \$250 being allocated to the franchise.

A. It does.

Q. Did Mr. Hilts ask you for that? [226]

A. He did not.

Q. You paid it voluntarily? A. I did.

Q. And when you paid the \$250 and put on it "for franchise," you referred to what?

A. To the franchise.

Q. To the franchise?

A. To the franchise payment I would have to make to Paramount.

Q. That is, on the 20-per cent basis?

A. It was on the franchise, on the franchise payment, on a 50-50 basis.

Q. A 50-50 basis?

A. It had already been modified in November.

Q. It is your position that that modification continued to operate after December 31st?

A. It was my notion that it did.

Q. Did you make another payment labeling it "franchise"? A. I did.

Q. That was the 6th of March, 1947?

A. I believe it was.

Q. That was the sole payment of \$250 which you applied on the franchise?

A. That is right.

Q. Then you made a third payment on March 13, 1947? A. I did. [227]

(Testimony of Charles P. Brewer.)

Q. And that was for the odd figure of \$494.25?

A. What is that?

Q. That was for \$494.25. That made the total payment \$994.25? A. It did.

Q. You designated it "on franchise"?

A. I designated it that was all on franchise.

Q. Can you reconcile any sum of money that you considered to be due on a 50-50 operator's basis with the sum that you paid?

A. No, or I would have never given him the \$494 check and told them I was done.

Q. But you did give them the check?

A. I did.

Q. You want this Court to now understand that when you gave them that check you knew it was money that you did not owe?

A. I gave them the check, as far as I was concerned—you say for money that I didn't even owe to them? Yes, I do.

Mr. Bernard: Objected to, your Honor.

The Court: Sustained.

Q. (By Mr. Rankin): What was your reason for terminating the agency agreement or franchise of July 1st when you wrote your letter of July 24, 1947?

A. I don't understand that.

(Question read.)

A. Will you clarify that a little bit?

Q. Why did you terminate your franchise agreement? [228]

(Testimony of Charles P. Brewer.)

A. Why did I terminate my franchise agreement?

Q. I have asked you three times, Mr. Brewer.

A. I am trying to understand the question.

Q. Yes. I think it is very simple. Why did you terminate your franchise agreement of July 1, 1946?

A. Because I figured their word was no longer good, nor would they live up to it.

Q. What word do you refer to?

A. To the modification of the contract.

Q. In what particular?

A. On the 50-50 basis.

Q. That is, Paragraph 5 of the contract which calls for the 80-20 basis they had told you, under your theory, would be divided on a 50-50 basis?

A. They did.

Q. And, when they didn't live up to that, that is the reason you canceled your contract?

A. That is entirely the reason.

Q. What do you mean, entirely?

A. There was no other reason.

Q. That modification, as you term it, occurred in November, 1946? A. It did.

Q. Just what was that modification?

A. That modification was to break off from the 20 per cent because the business would not cover it, and it would be split—— [229]

Q. What was the modification, not its effect, but what was the modification?

A. That they would split with me the net profit, if any, 50-50.

(Testimony of Charles P. Brewer.)

Q. Did Mr. Sibert talk to you anything about taking money home? A. Not especially.

Q. Did he say that when you took any money home, if you remitted the same amount to him you could go on, using the balance in the establishment of your business? A. Not in those words.

Q. Did he say that in substance?

A. He said if I got a dollar he would get a dollar.

Q. Was any provision made in the agreement that you describe for building up the business?

A. Yes.

Q. What was to be devoted to building up the business?

A. If you are speaking of the Eastern Oregon run——

Q. No, I am speaking of the business generally.

A. I was to use the money that I started the business on and what I could glean out of it as we built the business up.

Q. What you could what?

A. Glean out of the profits.

Q. How much could you glean out? How much could you devote to building the business up, yourself?

A. Well, everything that I could get out of it.

Q. You were going to take all the money you could get out of [230] the business, except what you took home, and then the additional amount that you were to pay Paramount, is that it?

(Testimony of Charles P. Brewer.)

A. I don't understand it. Repeat that, please.

Q. You say that you were going to pour back into this business whatever you did not need for yourself and Paramount? Is that right?

A. That is right.

Q. So that if you took a dollar home, then you were going to give Paramount an equal amount of money, and the balance you were going to use in the establishment of your agency. Is that correct?

A. I don't understand just what you mean in this respect. 50 per cent of the net profits was to be split, yes.

Q. Then, your answer to my question is "No," is it?

A. That is what I am afraid of. I was trying to understand.

Q. You need not be afraid.

A. I want to understand it before I say so.

Q. So, your answer is "No"?

A. All right.

Q. When you sent in your letter of July 24, 1947, your letter of termination, why didn't you give the 90 days called for in the contract?

A. Because I knew if I gave them that 90 days, they would move in here with a dozen men and take over possession of everything in sight, and I would be left sitting here broke. [231]

Q. You knew of that provision in the contract?

A. I did.

Q. You purposely avoided it for the reason you have just stated?

A. Yes.

(Testimony of Charles P. Brewer.)

Q. In reference to the June accounting of 1947, do you recall whether or not Mr. Hilts and Mr. Sibert talked over this whole matter with you at that time?

A. They never pulled an accounting.

Q. Did you see them on June 17th?

A. They never pulled an accounting on June 17th.

Q. Well, to make this very short: Did you hear Mr. Sibert and Mr. Hilts testify about what happened on June 17th? A. I did.

Q. What they have said is not correct?

A. Right.

Q. When was that accounting had, then?

A. It was some time after the 25th day of June. Excuse me. Hilts came back from Spokane, got into the office with keys that I had left, got his rough draft or whatever he pulled, took it to California and called Mr. Sibert's home at nine o'clock at night. I never did see that paper.

Q. You never saw what paper?

A. The final draft.

Q. Did you ever see any statement of the business done to [232] June 30, 1947? A. I did.

Q. Where was that?

A. That was in the office, here in Portland, around July 9th or 10th.

Q. Did you go over the figures then with Hilts?

A. No, not completely. I glanced at them and did not approve of them.

(Testimony of Charles P. Brewer.)

Q. You made a payment?

A. I made a payment.

Q. Why did you make a payment if you did not approve of it?

A. Because Mr. Hilts told me they were very much in need of money, and he would like to take some money home and couldn't I give him a check to take back.

Q. So you gave it to him out of charity towards the corporation? A. No charity.

Q. Why did you pay it if you did not owe it?

A. Because I was still in debt a certain amount of money to Paramount and any money that I gave him was to apply on that debt.

Q. Referring to Exhibit No. 36, can you turn to it there? A. I have it.

Q. Is that ink endorsement there of a payment of \$259.61 your endorsement?

A. It is. [233]

Q. You gave Mr. Hilts a check——

A. ——for that amount. I did.

Q. ——for that amount? A. Yes.

Q. That was \$256.61, wasn't it?

A. Check No. 413, \$259.61, it says here.

Q. \$259.61? A. Yes.

Q. Now, you testified on direct examination, I believe, that you determined to go into business for yourself on the 15th day of August. You meant July, did you not?

A. I believe I said somewhere around the 20th or 25th of July.

(Testimony of Charles P. Brewer.)

Q. That is July? A. Yes.

Q. Who owned this business from August 1, 1947, to August 27, 1947?

A. The assumed name was in my wife's name, but we owned it.

Q. I didn't ask you that question.

A. We owned it.

Q. "We?" A. My wife and I.

Q. Did your wife understand that she owned it?

A. She certainly did.

Q. Did you understand that you had an ownership in it, too? A. I did. [234]

Q. Why did she make the record that she was the sole owner of it?

A. An assumed name blank, that is filled out regardless of whatever business you go into; you have to file an assumed name certificate.

Q. That does not answer my question. When you had a part-ownership in it, why did you have your wife sign that she had the ownership alone?

A. I was busy working. I didn't want to take the time off and go through all the red tape that there may be connected with it.

Q. You know that record was false?

A. It was not false.

Q. You had an ownership in it, you say?

A. I could have an ownership in it. There is a community property law in the State of Oregon.

Q. You did have an ownership in it, you say?

A. I did.

(Testimony of Charles P. Brewer.)

Q. Why didn't you file it?

A. Whatever is hers is half mine, isn't it?

Q. Why didn't you make a recording to that effect?

A. The assumed name did not call for that.

Q. The blank calls for it. Look at it. "True Names * * * of the persons conducting, having an interest in." It calls for the names of all parties who are interested in the business.

A. My daughter is interested in it. [235]

Q. How old is she?

A. She is fourteen.

Q. Why didn't you put her on the assumed name certificate?

A. Because we did not consider it necessary.

Q. It was not done, I take it, for the reason that you did not want Paramount to know that you were going into a competitive business?

A. They would have known I was going in with her name or mine or both.

Q. You mean by that, even if she did file the certificate by herself, they would know you would be back of it?

A. They would know or anybody else would know that it was our business.

Q. As a matter of fact, Mr. Brewer, you intended to go into this business long before the 25th or anywhere near the latter part of July, didn't you?

A. I didn't.

(Testimony of Charles P. Brewer.)

Q. You intended to take over the business of Paramount Pest Control Service because you were the only person that the customers of Paramount knew?

A. That is not so.

Q. Consequently, you placed your order for business cards with your printer as early as the first part of July, 1947, didn't you?

A. If that is on the statement, I can't help it. I don't remember [236] any dates.

Q. Do you recall that as early as July 7, 1947, you placed Order No. 8564 with Allard J. Conger, doing business as Conger Printing Company, on the East Side, for 1500 business cards, in the name of Brewer's Pest Control?

A. I don't remember dates.

Q. You don't remember what?

A. I remember that I ordered cards from him some time, any time up to and including now, from Conger's. I don't remember any dates.

Q. What were those cards? What did they say?

A. Just said "Brewer's Pest Control" with the representative's name on it, if they are business cards you are speaking of.

Q. Did you not, on the same date, July 7, 1947, enter Order 8561 for service orders?

A. I don't know.

Q. Will you say you didn't?

A. I said I didn't know.

Q. Don't you know what you did? You have testified about other details here.

(Testimony of Charles P. Brewer.)

A. You are asking me for dates. I don't know dates.

Q. I am asking you if you put in service orders to——

A. I put in service orders, yes.

Q. You put in an order, I mean, to this very printer for service order forms, didn't you? [237]

A. I did.

Q. Did you not, on July 7, 1947, or before the date of your termination of this agreement, put in Order 8522 to Allard J. Conger for receipts?

A. I don't know.

Q. Why don't you?

A. Because I don't know what date I put it in.

Q. I said on any date before your termination?

A. I put in an order. I don't know the date.

Q. Was it before your letter of resignation?

A. I don't remember.

Q. You say you don't remember? You did not—
Would you say you did not?

A. I wouldn't say.

Q. Did you, on or about July 7, 1947, or at any time prior to your letter of resignation, place with Allard J. Conger Order No. 8503 for a large number of service slips?

A. I don't know.

Q. Were not all of these orders put in long before your payment of July 9, 1947, of the \$259.61?

A. I don't know.

Q. At the time you put in these orders or made that payment, did you tell any member of the Para-

(Testimony of Charles P. Brewer.)

mount Pest Control Service that you were preparing to take over this business yourself?

A. I did not. [238]

Q. Why not?

A. I was not preparing to take over any business.

Q. What were you doing with these orders?

A. If I had placed the orders, it would have been going into business.

Q. And if you had placed the orders and if you were intending to go into business, why wouldn't you tell Paramount Pest Control Service, if you were honest about it?

A. Would it concern Paramount if I went into business?

Q. Why, definitely.

A. I had told both Hilts and Sibert I would go ahead during the month of July, carry it during the month of July.

Q. Carry what?

A. Carry the business during the month of July.

Q. We will come back to that in a moment. But why didn't you tell them you were preparing to go into business for yourself? You knew you were?

A. I told Hilts I would not get out of the pest control service when I told him that I was through with Paramount, end of July.

Q. Did you not want, by these forms that you were getting out, these business cards, service or-

(Testimony of Charles P. Brewer.)

ders, receipts and slips, want the customers of Paramount Pest Control Service to think this was identically the same service that was going on except with the change of name?

A. I didn't want them to think anything bad about anybody. [239]

Q. That is not my question.

A. I didn't understand your question.

Q. I think you did.

(Question read.)

A. No, I didn't.

Q. But did you not hand to this printer the forms of Paramount Pest Control Service, with corrections on the Paramount forms to conform to your new proposed business?

A. Yes, I probably did.

Q. You know you did, don't you?

A. All right, I did.

Q. Why didn't you say so?

A. Because I didn't understand just about your dates there.

Q. Didn't you order them in the early part of July, 1947, for the purpose of having them on hand when your resignation became effective on August 1, 1947?

A. I don't know the exact date that I ordered them.

Q. Didn't you order them to have them on hand so you could take over this business?

A. I did have them on hand.

(Testimony of Charles P. Brewer.)

Q. Now, then, can you give the Court a very much better idea of when you determined to take over this business?

Mr. Bernard: Object to that, your Honor—if the Court please. He is assuming a state of facts the witness has not testified to. [240]

The Court: He may answer.

(Question read.)

A. Well, I can't give the date.

Q. Give the circumstances.

A. I told Hilts around July 9th or 10th, when he filled out this statement that he presented to me——

Q. (By Mr. Rankin): I am not asking you what you told Hilts. I am asking you for your mental process when you determined to take over this business.

A. I don't know. I am trying to tell you when I more or less started to make up my mind. I don't know the exact time.

Q. When did you make up your mind?

A. I don't know the exact date, but it was made up completely by the 20th to 25th.

Q. Were you incurring the expense of all these orders without having made up your mind that you were going to take over this business?

A. If they were placed by that time, then, I was taking on the bills for it personally.

(Testimony of Charles P. Brewer.)

Q. Then if they were placed as early as July 7th, how long before that would you say you made up your mind?

A. Possibly I could have done so when I told Sibert I was through after the end of July.

Q. Through where?

A. Through with the company. [241]

Q. You told you were going on through during July?

A. I told him I would run it during the month of July.

Q. Yes. When did you and your wife discuss the matter of terminating your agency?

A. I don't remember the date; some time in July.

Q. It was not until July that you and your wife discussed it?

A. Nothing definite, no.

Q. When was it first suggested between you and Mrs. Brewer that you terminate your agency?

A. When I told Sibert I would stay with it during the month of July.

Q. Wasn't it previously discussed with her?

A. No.

Q. Will you please answer my question? It will save a lot of time. When did you and your wife first discuss the termination of this agency?

A. After I had told Sibert that I would carry on the business during July.

Q. What date was that?

A. It was some time around the end of June, after the first day of July, in his home in Oakland.

(Testimony of Charles P. Brewer.)

Q. When did you discuss with Mr. Duncan that you were going to take over this business?

A. You keep referring to taking over the business. I didn't take over the business. [242]

Q. What did you do?

A. I went into business for myself.

Q. Isn't that just another way of saying you would take over all of Paramount's business you could get?

A. No.

Mr. Bernard: Object to the question. It is argumentative.

The Court: He may answer.

A. There is lots of new business started up in the State of Oregon, and I went after that. We didn't take over anybody's business.

Q. (By Mr. Rankin): Do you know whether or not you are under obligation not to solicit?

A. I don't know about anything concerning that.

Q. You were aware of the provision in your franchise that you were not to solicit customers of Paramount?

A. I was.

Q. Did it mean anything to you?

A. Not after they would not keep their word with me.

Q. When did you discuss going into business for yourself with Rightmire?

A. I told him I was going into business some time around the first of August.

Q. When did you tell him you were going into business?

A. Some time around the first of August.

(Testimony of Charles P. Brewer.)

Q. And he did not know prior to that, prior to the first of [243] August, that you were going into business for yourself?

A. As far as I knew, he didn't.

Q. Then you would be the only one that would tell him, or would your wife?

A. I would have told him.

Q. You did not take it up with Rightmire until August 1st, is that right?

A. I don't know just the exact date.

Q. You have been pretty definite in all other things.

A. I know the last week of July he was on vacation. I didn't see him the last week of July.

Q. That may be, but didn't you talk it over earlier in July, before he ever went on his vacation?

A. I don't remember.

Q. And as important a matter as your breaking your franchise and going into business for yourself does not leave an impression on you as to when you told Rightmire you were going into business?

A. It does not.

Q. When did you discuss with Merriott the fact that you were going into business for yourself?

A. I think it was around the first of August.

Q. So, while you placed all these orders for Brewer's Pest Control, you did not lay any grounds for the servicing that you were going to require with any employees that you subsequently had until August 1st, 1947? [244]

(Testimony of Charles P. Brewer.)

A. I would have done all my own service work if I hadn't had any employees.

Q. I say, you did not make any arrangement until August 1st, 1947?

A. No definite arrangement.

Q. Did you make any indefinite ones?

A. I don't know. There may have been a word said, but there was nothing deliberately specified.

Q. Sort of a general understanding?

A. No, I wouldn't say that.

Q. Was "Brewer's Pest Control" in the telephone book,—Was its number in the telephone book when you left the services of Paramount Pest Control Service? A. No.

Q. How would all the customers that you had previously served in the name of Paramount know where to find Brewer's Pest Control?

A. They would have had to call Brewer's Pest Control.

Q. Individually? A. Right.

Q. Did you tell those customers to call you at your home number?

A. I only talked to a very few customers.

Q. Answer the question.

A. What customers?

Q. Paramount's customers.

A. I never told Paramount's customers to call me at any time. [245]

Q. Did you ever let them know the number on these 1500 business cards that you were having printed to put out? A. I did.

Mr. Rankin: No further cross-examination.

(Testimony of Charles P. Brewer.)

Redirect Examination

By Mr. Bernard:

Q. I want to ask you one or two questions. Did you order any cards, forms or anything prior to the time you had been notified that on the first of July you would have to go back on the 20-80 basis?

A. I did not.

Mr. Bernard: I think that is all.

Mr. Rankin: That is all, your Honor.

(Witness excused.)

The Court: I am sorry to have to make a little explanation about my own circumstances. I imagine it won't be satisfactory to you gentlemen. Mr. Lyon is here from Los Angeles. I have to hear him some time today, as well as opposing counsel in a patent case. Then tomorrow I cannot hear you at all, due to an emergency matter that has arisen in the court. I can resume this case on Friday and continue over to Saturday, if that is necessary.

Mr. Bernard: That will be quite satisfactory to me. In fact, for reasons of my own, I was going to have to ask the Court [246] not to run too late this afternoon anyway.

The Court: Mr. Rankin, may we have your concurrence in resuming this matter on Friday?

Mr. Rankin: I know how busy this Court is. While, as the Court correctly prophesied, it is not satisfactory, it will have to be done because I know

the compulsion that the work of this Court is under. If your Honor will just designate when to report, that will be satisfactory.

The Court: We will resume Friday morning and, if necessary, run Saturday as well.

(Thereupon, an adjournment was taken until 10:00 o'clock a.m. Friday, January 23, 1948.)

Court reconvened at 10:00 o'clock a.m., Friday, January 23, 1948, pursuant to adjournment.

ALLARD J. CONGER

was thereupon produced as a witness on behalf of plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rankin:

Q. Your name is Allard J. Conger?

A. Yes.

Q. Where do you live, Mr. Conger?

A. 2030 Southeast Harrison, Portland.

Q. What is your business?

A. Printing and lithographing, sir.

Q. How long have you been so engaged?

A. Since 1918.

Q. Do you know Mr. Brewer?

A. Just as a casual customer, yes.

Q. When did you first know him?

A. I believe—Oh, I think it was the beginning of 1947, as far as I can recall.

Q. Did you ever do any printing for him?

A. Yes, sir.

(Testimony of Allard J. Conger.)

Q. What did you do?

A. Oh, various small forms, cards and stationery.

Q. Have you any record of those jobs?

A. We always keep a complete record of all work done.

Q. I would like to hand you, Mr. Conger, certain exhibits in this case known as 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74 and 75, and ask you if you can identify any of those exhibits and your having anything to do with them?

A. Yes. Those are all checks that cleared through our bookkeeping department and the work here, I believe, was all produced in our plant.

Q. When was that done?

A. Well, it was during 1947.

Q. Can you give the Court a more specific date?

A. I will have to refer to our records here in order to do that. Succeeding dates, July 7th——

Q. Did he place an order with you on July 7th?

A. That is the date the order was placed.

Q. What order was placed on July 7th?

A. Service orders, 2,000 service orders.

Q. What were those? Can you identify among the list of exhibits the one you classify as a service order?

A. Yes, sir. It is this form here, and so states on the heading, "Service Order."

Q. Can you refer to an exhibit number? There is a stamp on it in the lower right-hand corner, I believe.

A. Exhibit No. 70. [249]

(Testimony of Allard J. Conger.)

Q. Exhibit No. 70? A. Yes.

Q. There were two thousand of those?

A. Yes.

Q. What was the next order?

A. The next was another order on July 7th, receipts in duplicate.

Q. Do you find among those exhibits a copy of a receipt that you printed? A. Yes, sir.

Q. What exhibit number is that?

A. Exhibit No. 67.

Q. Exhibit No. 67? A. Yes.

Q. How many of those receipts did you print?

A. 2,000 sets, in duplicate.

Q. What was the next order?

A. The next order was also July 7th was 5,000 service slips.

Q. 5,000 service slips. Do you find any exhibit number there covering service slips of that character that you printed? A. Yes, sir.

Q. What exhibit number is it?

A. Exhibit No. 68.

Q. Exhibit No. 68? A. Yes. [250]

Q. What other order, if any, did you receive from Mr. Brewer?

A. There is quite a few here on succeeding dates. July 7th, 2,000 statements; July 11th, I should say.

Q. Were there any more on July 7th?

A. No, that is all entered on July 7th.

Q. I direct your attention to Order 8564 for 1,500 business cards. What was the date of that order? A. That was July 7th.

(Testimony of Allard J. Conger.)

Q. July 7th? A. Yes, sir.

Q. How many of those business cards did you print? Is that the correct number, 1,500?

A. 1,500, sir.

Q. Do you find any exhibit number for a business card among those exhibits that were handed to you? A. Yes, sir.

Q. What is the exhibit number of that?

A. No. 69.

Q. 69? A. Yes.

Q. When did you deliver the wares or goods made under these July 7th orders?

A. They were delivered at different dates.

Q. When was the first date of delivery?

A. The first date of delivery was July 14th on the 1,500 cards. [251]

Q. Those were the business cards represented by Exhibit 69? A. Yes, sir.

Q. Were all of those products delivered at various times thereafter?

A. Yes, sir, various dates.

Q. Did you render him a statement for them?

A. They were rendered, yes, later in the month.

Q. But you did render statements?

A. Yes.

Q. And were they paid?

A. Very promptly paid, yes.

Q. And the checks that are in evidence there are the checks you received in payment for the printing service that you have described, is that correct?

A. Yes, that is correct.

(Testimony of Allard J. Conger.)

Q. How did you get the forms from which to do that printing that you have described?

A. They were furnished by Mr. Brewer.

Q. Have you those forms?

A. I may have some of them.

Q. Will you produce all you have, please?

A. There (indicating) is a copy of the business card, service order and receipt. That is all I have with me.

Q. May I see them? A. Yes. [252]

Q. Mr. Conger, I would like to hand you the card of the Paramount Pest Control Service with Charles Brewer, as manager, and ask you if that is a form that you refer to as having used from which to draw Mr. Brewer's business cards?

A. Not necessarily. That was a copy of their card. I believe that was brought along more for style. The pencil written copy here, I believe is the one that was followed, instead of the type.

Q. But he offered it to you at the time for the style of the card? A. That is right.

Mr. Rankin: We wish to offer that in evidence.

The Court: Take everything over to Mr. Bernard. You have not seen these things, have you?

Mr. Bernard: No, we have not, your Honor.

Mr. Rankin: I had not seen them before, either.

Q. I hand you what purports to be a copy of a service order for Paramount Pest Control Service with "Paramount" and "Service" and other matters stricken out and "Brewer's——" I don't know what that is. "Brewer's" is written over it.

(Testimony of Allard J. Conger.)

I will ask you if that material was given to you—if that is the material that was given to you, as you describe, for the purpose of drawing Mr. Brewer's contract form.

A. Yes. This particular form was used as copy, with the changes indicated. [253]

Mr. Rankin: We offer that in evidence.

Q. If I understand your testimony correctly, you said you had also drawn a large number of receipts, and I hand you this receipt, originally of the Paramount Pest Control Service, with "Paramount" and "Service" stricken out and "Brewer's Statewide" Pest Control or "Brewer's Statewide" written over it, and ask you if this is the form from which you made Mr. Brewer's receipts?

A. Yes, sir, that is the case. That is the copy that was used.

Mr. Rankin: We offer that in evidence.

Q. Have you had any talk with Mr. or Mrs. Brewer since the first of the week?

A. He was in the office, I believe, yesterday.

Q. Did he see you? A. Yes.

Q. What did he want?

A. He wanted to confirm the date of the purchase order of these items.

Q. Did you confirm it with him?

A. I did.

Q. Was there any other conversation?

A. I believe not.

Mr. Rankin: That is all. You may cross-examine. [254]

(Testimony of Allard J. Conger.)

Cross-Examination

By Mr. Bernard:

Q. When did you say Mr. Brewer was in?

A. Yesterday.

The Court: Do you have any objection to them?

Mr. Bernard: No, I have not, your Honor. I have no objection.

The Court: They are all admitted. Do you want to give them exhibit numbers before Mr. Bernard cross-examines?

(Copy for business cards furnished Conger Printing Company thereupon received in evidence and marked Plaintiff's Exhibit No. 78.)

(Copy furnished Conger Printing Company for service order thereupon received in evidence and marked Plaintiff's Exhibit No. 79.)

(Copy furnished Conger Printing Company for receipt thereupon received in evidence and marked Plaintiff's Exhibit No. 80.)

Mr. Rankin: The service order is here; the receipt is here; the business card is here, but I do not find the service slip. We had it here and he described it as 5,000. Where has it gone? Have you got it over there?

Mr. Bernard: No, we haven't got it. [255]

A. I believe it is in this bunch. I don't believe I gave you a copy of the service slip. I do not have that one here.

(Testimony of Allard J. Conger.)

Mr. Rankin: You do not have a copy of that?

A. No, I just have the three. The three was all I brought in.

Q. (By Mr. Bernard): Would you examine Plaintiff's Exhibit No. 79 and tell whose handwriting that is up at the top?

A. I believe that is my office manager's handwriting.

Q. As a matter of fact, you did not take this order at all, did you? One of your employees did?

A. I believe that is correct.

Q. That order was put in on what date?

A. July 7th.

Q. Then the order placed on July 7th was placed with one of your employees?

A. I believe that is right.

Mr. Bernard: That is all.

Redirect Examination

By Mr. Rankin:

Q. You then printed these slips in accordance with the order, did you? A. That is right.

Q. And Mr. Brewer received them?

A. Yes, sir.

Q. He made no objection to them? [256]

A. No, sir.

Q. And the only direction you had was that which you have indicated as to how those orders were to be compiled? A. That is right.

Q. Did Mr. Brewer sign your order book in any way?

(Testimony of Allard J. Conger.)

A. We keep a record of receipts in the office. I haven't those available here.

Mr. Rankin: That is all. Just a moment. For your information, after this is all over and the Court has finished with them, I will be glad, on your request, to have these returned to you for your files, if possible.

A. Thank you. It is not too important if they are not returned.

The Court: That is all. Step down.

(Witness excused.) [257]

G. H. HANSEN

was thereupon produced as a witness on behalf of plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rankin:

Q. Give your name to the Court, please.

A. G. H. Hansen.

Q. Is that P. H.? A. G. H.

Q. Where do you reside?

A. In Portland.

Q. What is your occupation?

A. I am District Agent for the U. S. Fish and Wild Life Service.

Q. How long have you been such?

A. I have been in Oregon since September, 1945.

Q. Were you in that service prior to that date?

A. I have been in that service since 1931.

(Testimony of G. H. Hansen.)

Q. Do you know Charles P. Brewer?

A. No, I don't. I don't recall ever having met him.

Q. Do you have anything to do with a common poison known as 1080? A. Yes, we have.

Q. I should not say "common." It is not. Do you have anything to do with a poison commonly known as 1080?

A. Our field men, as well as myself, after being authorized [258] by our central office, are permitted to use it under certain circumstances, under proper regulations within the State of Oregon.

Q. Are you the head of the department here?

A. I am the head of that department that uses that material.

Q. Is it a common poison on the market?

A. No, sir, it is not.

Q. How do you buy it?

A. We requisition it, on approval from the central office, from our Pocatello supply depot.

Q. There is testimony in this case, given by Mr. Brewer here, that in July of 1947 he went to the Fish and Wild Life Department in the Weatherly Building and purchased one pound of a poison known as 1080, for which he paid \$8.00.

Do you find any record of such a purchase?

A. We are not permitted to sell 1080.

Q. Well I would like to get an answer to that question. Do you find any record of his having made a purchase?

A. No, there is no record in our office.

(Testimony of G. H. Hansen.)

Q. You say you are not permitted to sell 1080?

A. That is correct.

Q. Will you explain to the Court why?

A. 1080 is definitely a hazardous poison to handle. The research people don't know too much about it yet. So far as we know, there is no antidote and it is not supposed to be available [259] to the general public until more is known about this poison as it is used.

Q. Are there means by which established concerns can purchase that poison?

A. I understand that established persons can purchase it direct from the company that manufactures it.

Q. You were previously advised by us, were you not, that Mr. Brewer had claimed to make this purchase from your department in the Weatherly Building?

A. Yes.

Q. What department is that in the Weatherly Building?

A. The Fish and Wild Life Service office in the Weatherly Building is our regional office, and they handle all fiscal matters that pertain to the six or seven western states in the Northwest.

Q. Do they have 1080 on hand to purchase there?

A. They don't handle 1080 in the Weatherly Building.

Q. Did you make inquiry of the office to ascertain whether that is correct or not?

A. I called them last night and they have no records of ever having it over there.

(Testimony of G. H. Hansen.)

Q. Suppose an application had been made at the Weatherly Building for the purchase of 1080, what would have happened to that application?

A. That would have been referred to our office over here in [260] the Pioneer Post Office Building.

Mr. Rankin: That is all.

Cross-Examination

By Mr. Barnard:

Q. Was your office formerly in the Weatherly Building?

A. Our office was formerly in the Weatherly Building.

Q. When did you move?

A. It will be two years this April.

Q. How many employees are there over there in the Weatherly Building?

A. We have at the present time two office girls and Mr. Boomhower who is in charge of law enforcement, and Al Moore who is with the research division.

Q. What men were over there in July, 1947?

A. The same men that I have just named.

Q. Those are all of the men that were over there in July?

A. That is correct.

Q. Is there a man by the name of McDonald over there?

A. McDonald?

Q. Yes.

Q. There is a McDonald in the Weatherly Building, not in our office.

(Testimony of G. H. Hansen.)

Q. I meant to ask you about the personnel over there in the Weatherly Building. What men were there in July, 1947, in the Weatherly Building?

A. I don't know all the employees in the Weatherly Building.

Q. About how many men are employed over there?

A. Most of them are bookkeepers. There are, I think, four or five regional inspectors and the regional director and the assistant regional director.

Q. There was a man by the name of McDonald over there? A. Yes. He is still there.

Q. What is his position there in that office?

A. He is in charge of Federal refugees in this region.

Q. What do you people use this 1080 for?

A. We use it on rat control work and predatory animal control work.

Q. You do not sell any of it? A. No.

Q. Or are not supposed to sell any of it?

A. We don't sell any, no.

Q. Did you ever get any of it over there?

A. No.

Q. This 1080, in what shape does it come to your office?

A. The packages that we have received are half-pound containers with the manufacturer's label on them.

Q. What manufacturer?

A. The Monsanto Chemical Company.

(Testimony of G. H. Hansen.)

Q. I am not going to take this out of the sack, but look at that can and that sack and tell if that is the kind of cans [262] this comes in to your department?

A. Yes, the kind of cans which the manufacturer shipped it in.

Q. And the can—the kind that come to your office? A. Yes, sir.

Mr. Bernard: Do you want to look at it?

Mr. Rankin: Will it hurt me if I look at it?

A. No, sir, it won't hurt you.

Mr. Bernard: That is all.

Redirect Examination

By Mr. Rankin:

Q. This can says, "Don't breathe dust or get on skin." That is true, is it? A. Yes.

Q. Use rubber gloves?

A. That is recommended, yes.

Q. And that is the Monsanto Chemical Company? A. The Monsanto Chemical Company.

Q. It has marked on it "Fatal Poison" with the skull and crossbones and "Fatal Poison" all in red.

A. Yes.

Q. Is Mr. McDonald, to your knowledge, permitted to sell 1080?

A. No, to my knowledge he is not.

Q. Would you know if he were permitted to sell it?

A. Yes, I would be advised if he was permitted to handle it or sell it. [263]

(Testimony of G. H. Hansen.)

Q. Have you ever been advised that McDonald has any right to sell 1080? A. No, sir.

Q. There is one question I should have asked you on direct examination and, with the Court's permission, I would like to ask it now.

Did Mr. Brewer come into your office in the last few days, to your department?

A. The young ladies in the office report Mr. Brewer was in yesterday, day before yesterday.

Q. For what purpose? A. To obtain——

Mr. Bernard: That would be hearsay.

Mr. Rankin: He is in charge of the office.

The Court: Answer the question.

A. To obtain some 1080.

Mr. Rankin: Did he get it?

A. No, he didn't get it.

Mr. Rankin: That is all.

Recross Examination

By Mr. Bernard:

Q. Can you tell me the name of any of the other men over there in that office?

A. In the Weatherly Building?

Q. Yes. [264]

A. Well, I don't think I would be permitted to, under the regulations of the Department. I don't think I would be. I don't think I should answer that.

Q. Can you tell me about how many of them there are over there?

(Testimony of G. H. Hansen.)

A. There are four or five regional inspectors; there is the administrative office; there is the regional directors and the assistant regional director and some clerical help.

Mr. Bernard: That is all.

Mr. Rankin: That is all.

(Witness excused.) [265]

C. W. FISHER

was thereupon produced as a witness on behalf of plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rankin:

Q. Your name is what? A. C. W. Fisher.

Q. Where do you live, Mr. Fisher?

A. 2400 Tenth Street, Berkeley, California.

Q. What is your business?

A. Pest control.

Q. By whom are you now employed?

A. By the Sully-Van Corporation.

Q. Were you ever employed by Paramount Pest Control Service? A. Yes, sir.

Q. You were in the employ, were you, of the Paramount Pest Control Service in July, 1947?

A. Yes, sir.

Q. Did you at that time see the defendant, Charles P. Brewer? A. I did.

Q. Where did you see him?

(Testimony of C. W. Fisher.)

A. Saw him at the Paramount Pest Control office, 519 Northwest Park in the evening, around 5:00 p.m., July 30, 1947.

Q. Did you see him anywhere else that evening?

A. Yes. [266]

Q. Where?

A. We had dinner and spent the entire evening together, Mr. and Mrs. Brewer and myself.

Q. Whereabouts?

A. First, we drove from the office out to his home here in Portland, on 28th Avenue, I believe it is, and, on our arrival there, Mrs. Brewer and Mr. Ray Rightmire were in the kitchen visiting, and Mr. Brewer was very happy to see Mr. Rightmire there because he had just returned from a few days' vacation.

Q. I should ask you, Mr. Fisher: Are you any relation to any of the officers of the Paramount Pest Control Service?

A. Yes, sir, I am.

Q. What relation, and to what member?

A. A brother to G. H. Fisher, one of the owners of the Paramount Pest Control Service.

Q. Did you, on this evening that you describe in July, when you met Mr. and Mrs. Brewer and Mr. Rightmire, have any discussion with those gentlemen and that lady?

A. Yes, sir.

Q. Did that discussion relate to why Mr. Brewer was leaving Paramount?

A. It did.

Q. Will you begin at the beginning and briefly, but fully, as fully as necessary, tell what was said

(Testimony of C. W. Fisher.)

in relation to Paramount and their leaving Paramount? [267]

A. The first discussion—Mr. Rightmire stated that he was glad he had taken a vacation because if he hadn't taken it then he would not have had it as a member of the Paramount Pest Control Service, and there was a little discussion at that time. Mr. Rightmire left, and Mr. and Mrs. Brewer and I returned to the Roosevelt Hotel, where I was staying, and we had dinner at the Roosevelt and, immediately after dinner, we retired to my room there.

Q. How long was it discussed with Mr. Rightmire in the Brewer home?

A. Just a few minutes, ten or fifteen minutes, possibly.

Q. Do you know what he was saying there?

A. He was telling of his vacation trip that he had just returned from.

Q. Whom was he telling that to?

A. Mrs. Brewer, when we arrived, and he told Mr. and Mrs. Brewer and myself about it.

Q. After you had finished your dinner, where did you go, you and Mr. and Mrs. Brewer?

A. We went to my room in the Roosevelt Hotel.

Q. About what time did you go to your room?

A. Some time between 9 and 10 o'clock.

Q. How long did they remain discussing the matter with you in your room at the Roosevelt Hotel at this time?

A. Until after midnight. [268]

(Testimony of C. W. Fisher.)

Q. Did they tell you they were leaving Paramount? A. Yes, sir.

Q. Did they give you any reason why?

A. They did.

Q. Could you briefly give what they said regarding leaving Paramount?

A. They said that the Paramount organization, and particularly Mr. Sibert, had not lived up to his promises to them and that they were leaving the organization and, within the eyes of Paramount, they would be the worst so-and-so's in the world as of August 1st because they were not only leaving the organization and going into a competitive business, but they were also taking all the Paramount employees with them into their business.

Q. Did you ever see Mrs. Brewer in the office of the company? A. Yes, sir.

Q. What was she doing there?

A. Done the office work, bookkeeping and answering the telephone and so forth.

Q. Did she engage in this conversation you are describing? A. She did.

Q. Did you know who were in the employ of Paramount at the time they said they were taking the employees with them? A. Yes.

Q. Who were they? [269]

A. Mr. Carl Duncan and Mr. Raymond Rightmire and Mr. Merriott.

Q. Do you know whether or not, from any subsequent knowledge that you had, they did go with Mr. Brewer? A. Yes, sir.

(Testimony of C. W. Fisher.)

Q. What else, if anything, was said regarding their leaving? May I strike that, please?

You said they were taking the employees with them. Was anything else said about the date on which they would leave Paramount? A. Yes.

Q. What was that?

A. They said they were and they had been collecting all the money that was on the books that they could possibly collect and that if, on August 1st, there was more than a dollar or two in Paramount's account they would be very lucky.

Q. Who would be very lucky?

A. Paramount Pest Control Service.

Q. Do you know how much was in the Paramount Pest Control account? A. No, sir.

Q. Was there anything else said about Paramount Pest Control conditions after they would leave? A. No, sir, not that I recall.

Q. Why did they select August 1st as that time?

Mr. Bernard: Objected to as calling for a conclusion [270] of the witness.

The Court: Answer.

A. Will you repeat the question?

Q. (By Mr. Rankin): Why was August 1st mentioned? You say "after August 1st." Do you know why August 1st was mentioned?

A. May I explain it in this manner?

Q. If you wish.

A. My arrival here was purely coincidental. I had been traveling throughout the State of Washington and had just arrived in Oregon, establishing

(Testimony of C. W. Fisher.)

distributors for Sully-Van. Mr. Sibert and Mr. Fisher own most of the stock in that corporation. At that time I was working in that capacity and, when I arrived here on July 30th, Mr. Brewer asked me how long it had been since I left the Oakland office, and I told him approximately two and a half weeks, so he said, "You don't know the news, then."

I told him I didn't and he said he had sent a letter of resignation, previous to the date of my arrival, to the Oakland office, which would take effect on August 1st, 1947.

Q. And that is the reason August 1st was mentioned? A. Yes.

Q. Was anything said about the condition Paramount would be in after the bank account had been reduced and the employees taken away, as to their rehabilitation? What was said on that score? [271]

A. It was said that Paramount would be in no position to take care of their accounts for some months to come.

Q. Who said that?

A. Mr. Brewer, because they would not have any equipment or stock, nor would they have any experienced personnel in this area and, not being familiar with the accounts and not having the equipment that our former employees had, it would be a few months before we would ever be able to regain our status, at that particular time.

Q. Was anything said about where they were establishing their office? A. Yes.

(Testimony of C. W. Fisher.)

Q. Where was that?

A. In the home, here in Portland.

Q. What did they say about that?

A. Well, about all there was—they would have—they would establish their business in their home temporarily.

Q. You mentioned something about equipment. What did they say about equipment?

A. Well, that they intended to keep the equipment and chemicals until they had been paid for that equipment, and that the usual procedure with Paramount would be that Paramount would take some time to do that, and they were going to keep it until they had received their money that was due for that equipment and chemicals. [272]

Q. Did they tell you the amount they claimed to be due from Paramount to them?

A. No, sir.

Q. Did they say whether or not they had tried to get it and had been denied?

A. Repeat the question.

Q. Did they say anything about whether they had tried to get their money and it had been denied them?

A. No, sir.

Q. Do you know of Mr. Hilts coming in, anywhere in this conversation?

A. Not this conversation, no.

Q. When did you first see Mr. Hilts?

A. Around 4:30 of July 31st in the hotel; he had registered in at that time.

(Testimony of C. W. Fisher.)

Q. That was the next day? A. Yes.

Q. Were you present when Mr. Hilts and Mr. Brewer met? A. I was.

Q. What was said in Mr. Brewer's presence?

A. Mr. Brewer was in the lobby and he called my room. A few minutes before that Mr. Hilts had called me, having just registered, and, as soon as Mr. Brewer arrived in my room, I telephoned Mr. Hilts' room and asked him to join us because Mr. Brewer had arrived. [273]

Q. What was said in his presence, Mr. Fisher?

A. Mr. Hilts, upon entering the room, walked over to Charlie and shook hands and said that this was a bombshell in their organization and particularly in the home office in Oakland, his resignation as of August 1st, and they and no one else could understand the reason for his attitude.

Q. What did Mr. Brewer say?

A. Mr. Brewer said that he supported and financed Paramount, or the Oregon territory, as long as he possibly could and he was getting out now for self-preservation.

Q. Was anything said in Mr. Hilts' presence about who might be going with Mr. Brewer in this new undertaking of his? A. No, sir.

Q. What did you do after that with respect to the equipment, if anything?

A. The following morning, August, Mr. Hilts and I went to the office and, upon arrival in the office, we found some canceling letters and complaints, cancellation letters.

(Testimony of C. W. Fisher.)

Q. Whom were those cancellation letters from, do you recall?

A. One in particular that I recall was the Hudson-Duncan Company account.

Q. Here in Portland, Oregon?

A. Yes, sir.

Q. Go ahead, please, with your statement of what you did.

A. Another complaint that I recall was the Zellerbach Paper [274] Company here.

While we were there, Mr. Hilts instructed Mr. Celsi—I believe that is the man's name in charge of the warehouse—to not permit any of the former employees into the office or into the warehouse without his consent because we had taken over from Mr. Brewer and he was no longer with the Paramount Pest Control Service and, upon this remark, Mr. Celsi said he couldn't restrain any of Mr. Brewer's men or Mr. Brewer from the warehouse because he had made the lease and had paid the rent.

There was some question, so Mr. Hilts instructed this gentleman to advise Mr. Brewer to come down to the warehouse, and that we would be back shortly after this complaint call, because that matter must be settled.

So, at approximately 2:00 o'clock in the afternoon Mr. Brewer and Mr. Duncan met Mr. Hilts and I in the warehouse and at that meeting Mr. Brewer instructed Mr. Celsi not to permit us into the storeroom until he personally had given consent

(Testimony of C. W. Fisher.)

for us to do so, so, to alleviate the responsibility placed on this man who more or less did not know just what to do, we told him we did not want access to the warehouse or any of the stuff in the warehouse until the entire matter had been settled.

Q. How long did you remain at Portland, Oregon, at this time? A. About thirty days.

Q. What were you instructed to do, if anything?

A. Primarily I took care of cancellations of contracts.

Q. You were the first man to engage in an effort to understand these cancellations?

A. Yes, sir.

Q. How long were you here as the only man doing that?

A. Mr. Hilts arrived the next day.

Q. Did Mr. Hilts work with you in trying to retain the company business?

A. In several cases, yes; not entirely.

Q. Who had the greatest number of calls to make in that regard, you or Mr. Hilts?

A. Myself.

Q. How long were you here without any further assistance except that of Mr. Hilts, in the capacity you have described?

A. Until Monday in the afternoon.

Q. What would be the date, approximately? How many days, approximately, was that?

A. I would say it was August 4th.

Q. Who came then? A. Mr. Sibert.

(Testimony of C. W. Fisher.)

Q. Where was that?

A. In the home, here in Portland.

Q. What did they say about that?

A. Well, about all there was—they would have—they would establish their business in their home temporarily.

Q. You mentioned something about equipment. What did they say about equipment?

A. Well, that they intended to keep the equipment and chemicals until they had been paid for that equipment, and that the usual procedure with Paramount would be that Paramount would take some time to do that, and they were going to keep it until they had received their money that was due for that equipment and chemicals. [272]

Q. Did they tell you the amount they claimed to be due from Paramount to them?

A. No, sir.

Q. Did they say whether or not they had tried to get it and had been denied?

A. Repeat the question.

Q. Did they say anything about whether they had tried to get their money and it had been denied them?

A. No, sir.

Q. Do you know of Mr. Hilts coming in, anywhere in this conversation?

A. Not this conversation, no.

Q. When did you first see Mr. Hilts?

A. Around 4:30 of July 31st in the hotel; he had registered in at that time.

(Testimony of C. W. Fisher.)

Q. That was the next day? A. Yes.

Q. Were you present when Mr. Hilts and Mr. Brewer met? A. I was.

Q. What was said in Mr. Brewer's presence?

A. Mr. Brewer was in the lobby and he called my room. A few minutes before that Mr. Hilts had called me, having just registered, and, as soon as Mr. Brewer arrived in my room, I telephoned Mr. Hilts' room and asked him to join us because Mr. Brewer had arrived. [273]

Q. What was said in his presence, Mr. Fisher?

A. Mr. Hilts, upon entering the room, walked over to Charlie and shook hands and said that this was a bombshell in their organization and particularly in the home office in Oakland, his resignation as of August 1st, and they and no one else could understand the reason for his attitude.

Q. What did Mr. Brewer say?

A. Mr. Brewer said that he supported and financed Paramount, or the Oregon territory, as long as he possibly could and he was getting out now for self-preservation.

Q. Was anything said in Mr. Hilts' presence about who might be going with Mr. Brewer in this new undertaking of his? A. No, sir.

Q. What did you do after that with respect to the equipment, if anything?

A. The following morning, August, Mr. Hilts and I went to the office and, upon arrival in the office, we found some canceling letters and complaints, cancellation letters.

(Testimony of C. W. Fisher.)

Q. Whom were those cancellation letters from, do you recall?

A. One in particular that I recall was the Hudson-Duncan Company account.

Q. Here in Portland, Oregon?

A. Yes, sir.

Q. Go ahead, please, with your statement of what you did.

A. Another complaint that I recall was the Zellerbach Paper [274] Company here.

While we were there, Mr. Hilts instructed Mr. Celsi—I believe that is the man's name in charge of the warehouse—to not permit any of the former employees into the office or into the warehouse without his consent because we had taken over from Mr. Brewer and he was no longer with the Paramount Pest Control Service and, upon this remark, Mr. Celsi said he couldn't restrain any of Mr. Brewer's men or Mr. Brewer from the warehouse because he had made the lease and had paid the rent.

There was some question, so Mr. Hilts instructed this gentleman to advise Mr. Brewer to come down to the warehouse, and that we would be back shortly after this complaint call, because that matter must be settled.

So, at approximately 2:00 o'clock in the afternoon Mr. Brewer and Mr. Duncan met Mr. Hilts and I in the warehouse and at that meeting Mr. Brewer instructed Mr. Celsi not to permit us into the storeroom until he personally had given consent

(Testimony of C. W. Fisher.)

for us to do so, so, to alleviate the responsibility placed on this man who more or less did not know just what to do, we told him we did not want access to the warehouse or any of the stuff in the warehouse until the entire matter had been settled.

Q. How long did you remain at Portland, Oregon, at this time? A. About thirty days.

Q. What were you instructed to do, if anything?

A. Primarily I took care of cancellations of contracts.

Q. You were the first man to engage in an effort to understand these cancellations?

A. Yes, sir.

Q. How long were you here as the only man doing that?

A. Mr. Hilts arrived the next day.

Q. Did Mr. Hilts work with you in trying to retain the company business?

A. In several cases, yes; not entirely.

Q. Who had the greatest number of calls to make in that regard, you or Mr. Hilts?

A. Myself.

Q. How long were you here without any further assistance except that of Mr. Hilts, in the capacity you have described?

A. Until Monday in the afternoon.

Q. What would be the date, approximately? How many days, approximately, was that?

A. I would say it was August 4th.

Q. Who came then? A. Mr. Sibert.

(Testimony of C. W. Fisher.)

Q. Did Mr. Sibert make any calls on any of these customers?

A. Not to my knowledge.

Q. Did you, at any time subsequent to that, make any calls on any other customers of Paramount Pest Control Service in an effort to retain the Paramount business? [276]

A. Yes, sir.

Q. Who?

A. Mr. Elfers and I went to the Albers Milling Company.

Q. Anybody else?

A. Mr. Elfers, Mr. Hilts and myself were the only three; we worked together.

Q. Will you describe to the Court whether or not there were many cancellations coming in following August 1, 1947, and what you did with respect to those cancellations that did come in?

A. Well, I couldn't keep up with them. The first account I called on was on Friday or Saturday, I guess, on August 1st—whatever the 1st of August was. I am a little confused there. On August 1st I called, immediately after finding the letter of cancellation, on the Hudson-Duncan people. It was sent by Mr. Lacey, so I called on that account and talked to Mr. Lacey. It is the general practice of our company, when we have a cancellation, to determine the reason for the cancellation, and I had found that they had given the account to Brewer's Pest Control. That was before noon on August 1st.

(Testimony of C. W. Fisher.)

Q. August 1st? A. Yes.

Q. Go ahead and describe in a general way—not too long or too much in detail—about what you generally did in connection with cancellations that came in, and what your investigation showed. [277]

A. I called on between twenty-five and thirty accounts, and the direct result in every instance—it resulted in better than eighty cancellations because in those twenty-five or thirty calls there were such accounts as the Safeway organization and other companies which had a number of stores that were under contract for service with our company.

Q. To summarize, what were your findings as to the cause of the cancellations?

A. The same type of service with the same servicemen, knowing the accounts that had been with Paramount, was to continue and take care of them, and they would receive the very fine service that they had had as the Paramount Company, but it would be in the name of Brewer's Pest Control instead of Paramount.

Q. I hand you, Mr. Fisher, Exhibits 54 and 55 that relate to the list of customers and ask you if these lists represent any of the customers that you had had any dealings with? You have seen them before, haven't you? A. Yes.

Q. This list of customers? A. Yes, sir.

Q. At that time, did you call any of these that are cancelled here? A. I did.

(Testimony of C. W. Fisher.)

Q. Without going into the detail of picking them out, what you describe as to their termination applies to those that you called upon?

A. The Dairy Co-op cancelled.

Q. Yes; but I say what you describe in general, does that apply to all of these?

A. Yes, in every case.

Q. There are some letters in there that seem to bear the initials, "CWF" or "C. W. Fisher." Have you looked through and determined whether those are your letters in reply to the cancellations?

A. Yes.

Q. What was your effort, and how did you go about endeavoring to hold this business?

A. Well, I would like to relate one specific instance, and that is more or less general.

Q. Yes.

A. Albers Milling Company, which had been an account of ours for several months—I called on them the morning of August 4th; it was Monday morning, with Mr. Elfers. On August 1st the account had been serviced by Brewer's Pest Control, and Mr. Flanagan showed me the service slip of Brewer's Pest Control signed by their servicemen—it was either Mr. Merriott or Mr. Rightmire, I am positive about that—that they had been serviced on August 1st.

So we inquired of Mr. Flanagan why Brewer's Pest [279] Control serviceman serviced the account when we had a contract with them and he said he

(Testimony of C. W. Fisher.)

didn't—he was not there when the service was rendered and that somebody else had signed the slip, and that he would find out at the time of the next call why they were servicing the account because, as far as he was concerned, he was under contract with Paramount Pest Control Service.

Q. Did you find any other accounts that were served by Brewer on August 1st, 2nd or 3rd, or immediately after the 1st of August?

A. Yes, sir.

Q. Do you have any idea how many of those accounts there were that were serviced immediately after August 1st?

A. Everyone I had called on, practically.

Q. Did Mr. Brewer make any appearance at the Paramount Pest Control office at this time?

A. On two or three occasions he was in to see Mr. Hilts with reference to a settlement.

Q. You were not present when those discussions were had? A. No, sir.

Mr. Rankin: You may cross-examine.

Cross-Examination

By Mr. Bernard:

Q. At this time in July when you came to Portland, July 30th, you were employed then by Paramount Pest Control Service? [280] A. No.

Q. Whom were you working for then?

A. Sully-Van Corporation.

Q. You went to work for Paramount about August 1st? A. On July 30th, I went to work.

(Testimony of C. W. Fisher.)

Q. As I understand it, out at the house that night you found Mr. Rightmire talking to Mrs. Brewer and he said he was lucky he had got his vacation, or something of the kind?

A. He said he took his vacation at that time because, if he hadn't, he would not have had it as an employee of Paramount Pest Control Service.

Q. Then you went over to the hotel, you and Mrs. Brewer and Mr. Brewer, and had dinner, and then went up to your room?

A. That is correct.

Q. Did you know up to that time that Brewer was leaving Paramount? A. Yes, sir.

Q. He advised you that he had resigned, was leaving, saying that Mr. Sibert had not lived up to his contracts with him? A. That is correct.

Q. Did there seem to be some feeling on Mr. Brewer's part? A. Very definitely.

Q. When, if you know, did Paramount Pest Control Service get control of the warehouse concerning which you have spoken?

A. I don't understand your question. [281]

Q. When did Paramount Pest Control Service procure possession of the warehouse, concerning which you have testified? Do you know that?

A. On Tuesday morning; I think it is August 5th. Mr. Sibert had met Mr. Brewer in the hotel the night before and Mr. Brewer consented to give us the keys to the warehouse the following morning.

(Testimony of C. W. Fisher.)

Q. You testified that prior to that time Mr. Brewer had been in several times for a settlement?

A. Not prior to that time.

Q. Prior to August 5th?

A. Not prior to that time.

Q. Afterwards? A. Yes, sir.

Q. Do you know anything about the negotiations back and forth that led to the surrender of the warehouse by Mr. Brewer on the 5th?

A. Only that meeting in Mr. Sibert's room at the Roosevelt. He confirmed he would give him access to it the following morning.

Mr. Bernard: That is all.

(Witness excused.) [282]

DeGREY S. BROOKS

was thereupon produced as a witness on behalf of plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rankin:

Q. Your name is DeGrey S. Brooks?

A. Yes, sir.

Q. Where do you live?

A. 5728 Northeast Fifteenth Avenue, Portland.

Q. How long have you lived there?

A. About two months.

Q. By whom are you employed?

A. Paramount Pest Control Service.

(Testimony of DeGrey S. Brooks.)

Q. Where did you live prior to the time of living here at that address in Portland?

A. Spokane, Washington.

Q. What business were you in in Spokane, Spokane, Washington?

A. I was manager of the Spokane office.

Q. Of what company?

A. Paramount Pest Control Service.

Q. How long, over all, have you been connected with the Paramount Pest Control Service?

A. About two years.

Q. When you came to Portland, Oregon, to take over the service of the company here, where were you living at that time? [283]

A. I was living at the Roosevelt Hotel.

Q. Prior to living here, where were you living?

A. Spokane.

Q. You were engaged in that work at Spokane?

A. Yes.

Q. How did you happen to come to Portland?

A. I came here the 2nd of August on a vacation with my family.

Q. When were you directed to take over the Portland office, as you describe?

A. I took over the Portland office about the 1st of September, I would say, although I arrived here on the 11th of August.

Q. You arrived here on the 11th of August?

A. The 11th of August and was put directly in charge of the office on or about the 1st of September.

(Testimony of DeGrey S. Brooks.)

Q. You were here about the 1st of August?

A. Yes.

Q. But that was on your vacation?

A. Yes.

Q. Did you meet Mr. Brewer or anyone connected with Mr. Brewer or any of these defendants on August 1st, on the 1st of August or thereabouts?

A. On the 2nd of August I met Mr. Brewer at the Roosevelt Hotel.

Q. What happened there at that time? I wish you would just [284] state what occurred.

A. I had just arrived in town with my family on vacation and was in the hotel about a half hour when the telephone rang in my room. I answered it, and it was Mr. Duncan, calling from Mr. Brewer's room.

Q. Is that Mr. Carl Duncan?

A. Mr. Carl Duncan, yes.

Q. One of the defendants in this case?

A. Yes, sir.

Q. Go ahead.

A. Mr. Duncan—I had asked Mr. Brewer to reserve a room for me, because that is how they happened to know I was coming out here, so they asked me if I would not come up and spend the evening. I didn't want to, but I agreed to later on and, after a little while, I went over to their room.

Q. What time did you go to their room?

A. I would say 7:30 or 8:00 o'clock.

(Testimony of DeGrey S. Brooks.)

Q. How long did you remain?

A. I stayed until about 9:30.

Q. Did you have any conversation with anyone there? A. Yes, sir.

Q. Who?

A. Mr. Brewer and Mr. Duncan and Rosalie Brewer, Mr. Brewer's wife.

Q. Just state what that conversation was, the detail of it. [285]

A. When I first went in there, it was sort of a social thing for a few minutes, and then Mr. and Mrs. Brewer started talking about Paramount Pest Control Service, sort of running it down in a way, and they went on for a little while. I asked them what the trouble was and he said, "You don't know?" He said, "You don't know that we and Paramount have severed negotiations?" And I said, "No."

He said, "I am not with Paramount any more," and I said, "I am sorry to hear that. What happened?" Well, he didn't tell me so much about what had actually happened. The whole trend of events was trying to discourage me against the Paramount.

Q. What did they say? What was the conversation leading to that?

A. They told me what had happened to them; that they had put all their money into this business and so forth, and Mrs. Brewer, on a number of occasions, would look over at me and say, "For

(Testimony of DeGrey S. Brooks.)

God's sake, don't ever owe Paramount any money because they will put the damper on you," or words to that effect, indicating that Paramount was going to get me next, and, the fact of the matter is, Mr. Duncan took a 5-cent piece that he asked me for and I gave it to him, and he placed an additional 5-cent piece with it and at least five times that evening he would point to this 10 cents and give me about six months, and he would bet a drink of beer with me that I would [286] be out of Paramount.

Q. Did they say what they were going to do?

A. They told me they were going to take a vacation. Mr. Brewer told me he was going to take a vacation for six weeks and then didn't know what he was going to do. He said he had had a number of offers, one particularly from the Ardee Maintenance Company, and he would probably accept one of them.

Q. What is the Ardee Maintenance Company engaged in?

A. Competitive pest exterminating.

Q. Pest control? A. Yes.

Q. Was anything else said by them that evenings?

A. Well, nothing whatever—it was just sort of a program to try to win me over to their way of doing, that they had really been harmed by Paramount Pest Control——

Mr. Bernard: I believe, your Honor, that this witness should be required to state what was said and not to draw conclusions.

(Testimony of DeGrey S. Brooks.)

The Court: Go ahead, and tell your story.

Q. (By Mr. Rankin): Did Mrs. Brewer take any part in the conversation?

A. Well, a number of times she spoke up and laughed and said, "Don't ever get in debt to the Paramount people," and about after an hour and a half I got tired of it and told them the best thing to do is to leave good friends, which I did, [287] but Mrs. Brewer said a number of times, "No use trying to get Mr. Brooks to see our side of it. He is a Paramount man." That was said a number of times there during the evening.

Q. What did Mr. Duncan say, if anything, about their severance?

A. Nothing much outside of trying to collect 10 cents for his beer.

Q. Did they say when they were going into business?

A. He told me he was not going into business.

Q. Who told you that? A. Mr. Brewer.

Q. Did Mr. Duncan say whether or not he was going into business?

A. No, Duncan told me he didn't know what he was going to do, that he was going to take a couple of weeks' vacation and go down to the wedding of an aunt or somebody in the south, and when he came back up here he would then make a decision.

Q. Did Mrs. Brewer have anything to say about what her future would be? A. No, sir.

(Testimony of DeGrey S. Brooks.)

Q. Did you talk with them again after this occasion?

A. I only saw Mr. Brewer once, and he came up to my office looking for Mr. Hilts.

Q. Did he discuss at that time anything about leaving Paramount? A. No, sir. [288]

Q. Have you told the Court, Mr. Brooks, every reason that they gave for leaving Paramount?

A. Well, they just simply said that they had had an injustice done to them, they were busy spending their money, they had put thousands of dollars into Paramount and had gotten very little remuneration from it and they just had enough of it.

Q. Did they say anything about taking the help away from Paramount to you?

A. No, sir, they didn't.

Q. When did you start in? Did you start in subsequently to this on the work of trying to overcome the cancellations?

A. I arrived here the 11th of August and from then on I started working on cancellations.

Q. That was the 11th of August, 1947?

A. That is right.

Q. What did you do in an endeavor to stop cancellations?

A. Well, we called on them as fast as they would come in. If it was a letter or if it was a phone call, the boys had to turn in reports on their service calls on cancellations of this kind and

(Testimony of DeGrey S. Brooks.)

I tried, as soon as possible, to contact all of them and find out their reasons for canceling.

Q. Why would you do it?

A. A general custom with Paramount Pest Control, if you lose an account. We want to know whether it is the serviceman's fault or whether the service has been bad. We want to [289] know whether the customer is satisfied or not.

Q. How long did you work on the matter of overcoming these cancellations?

A. I am still working on them.

Q. Have you been in the employ of Paramount Pest Control Service here ever since?

A. Yes, sir, with the exception of just occasionally running over to Spokane.

Q. Is that continuous employment here?

A. Yes, sir.

Q. Can you state, as a summary of these accounts that you have contacted, what the reason is for their cancellations?

A. The general reason has been very much the same in all cases, those that I have contacted personally. It seems as if the men who were servicing them were doing a good job, and these same men would still come, and the only part that was a little unethical was the fact that these same men, in many instances, would go in and service the account and walkout, have a slip signed, and the customer didn't know that it was not Paramount. There was no mention made of the fact that this was Brewer's Pest Control. The service was ren-

(Testimony of DeGrey S. Brooks.)

dered by the same man who had been coming there, and when they came in again to do the service, why, then he went ahead and did his work and had a slip signed. If the customer did not know that there had been a change in name, they could have gone on [290] and on and on.

Q. Did you make any general inquiry as to what, if any, representations were made?

A. Yes, there were many representations made.

Q. What were those?

A. You want me to name the customers?

Q. I don't think that is necessary now. As a general summary, give what those representations were that caused the cancellations, if any?

A. The fact that some of the servicemen, in some instances, would go in and say the company was dissolving.

Q. What do you mean by "company"?

A. That we are not going to continue in business; we are discontinuing business up here.

Q. What do you mean by "company"?

A. The Paramount Pest Control Service.

Q. That the Paramount Pest Control Service was dissolving?

A. Yes. In other cases he would go in there and service the account; if it was the same man, they never thought about it.

Q. Anything else you can think of that your investigation showed as to the reasons for canceling Paramount contracts?

(Testimony of DeGrey S. Brooks.)

A. No, other than that the same personnel was serving these accounts and that Mr. Brewer or his representatives would walk in and say they were taking the account over on such and such [291] a date, and it would be known as Brewer's Pest Control Service.

In one case, particularly, they told the man that they were taking over, and that we were discontinuing business, that Paramount Pest Control Service was not a company, it was a trade name, they were changing their forms to Brewer's Pest and, instead of paying a royalty on this trade name, Control, and in each case they gave the man a discount on the regular cost of his services to prove that they were saving him a little money.

Q. As manager in charge of this office, Mr. Brooks, did you have any cancellations that called for any repayment of money? A. Yes, sir.

Q. Describe those, please?

A. We had a number—In fact, we have got several thousand dollars on the books of moneys still due on accounts that are unpaid, if that is what you mean.

Q. Did they write in and say, "We have had your service and we don't owe you this money"?

A. Oh, yes.

Q. Did you have any cases where there was a repayment by you to the customer? Did you have any cases where there was a repayment by you to the customer who had already paid for the service?

(Testimony of DeGrey S. Brooks.)

A. Not repayment. We gave him credit for service, and rendered service for which we got no bonus. [292]

Q. Why not?

A. Why—Well, it had been paid in advance; they had paid up several months, those where they had paid several months in advance; that happens lots of times.

Q. Had nothing to do with Brewer?

A. No, had nothing to do with Brewer.

Q. Did you have any cases where you had to remit to them because Brewer had done the service and you had not done it and you remitted any part that had been paid?

A. No. I have not refunded any money.

Q. As manager of the office, did you find all the records there when you come to the office to start work there?

A. I found records but I wouldn't say that the records were complete.

Q. Why not?

A. Well, for our service routings, the cards the men turned in as to where to go on certain dates, and so on, they were many of them blank. There was the name of the customer on there but there was no way of determining whether they had had service or not. In other cases, the cards were dated up in September and October—you could not get any detail from them, and we had to go to the ledger and look them up and work our routings over from the ledger.

(Testimony of DeGrey S. Brooks.)

Q. Did you find any substitutions in your records, where the original records are gone and something substituted for them? [293]

A. Just had cards with the names on but didn't have any detail whether they were accounts or anything. I wouldn't say whether it was substituted or what happened. That was the way Mr. Brewer had run the office.

Mr. Rankin: You may cross-examine.

Cross-Examination

By Mr. Bernard:

Q. As I understand it, you talked with Mr. and Mrs. Brewer on the evening of August 2nd?

A. I believe so.

Q. And you want the Court to understand that he did not tell you at that time that he was in the pest control business?

A. No, sir, he didn't.

Q. Did you see Mr. Wendy Fisher about that time? A. I did, sir.

Q. Did Mr. Fisher ever tell you he had told him on July 30th that he was going into the pest control business?

A. Mr. Fisher didn't tell me that until after I had seen Mr. Brewer.

Q. There seemed to be quite a lot of feeling that night on the part of Mr. and Mrs. Brewer?

A. That is right, sir.

(Testimony of DeGrey S. Brooks.)

Q. They said they had been treated badly by Paramount Pest Control Service; in other words, in your own words, I believe you said the net result was that they said an injustice had [294] been done them.

A. Yes, sir.

Q. And Mr. Brewer, particularly, was quite worked up over the proposition?

A. Yes, sir.

Q. You have testified that a certain unnamed man told you that somebody told them that the reason Brewer was taking over was because Paramount was dissolving. Will you give us the name of this customer or former customer of Paramount who told you that?

A. The Sugar Bowl in The Dalles.

Q. Who up there told you that?

A. The manager and owner of the Sugar Bowl.

Q. What is his name?

A. I don't know what his name is. I would have to look it up.

Q. Who else told you that?

A. I think that is sufficient.

Q. You mean that is sufficient, or is that the only one?

A. That is a case that can be tested, taken up and the man will verify it.

Q. I am asking you to give us the names of any other former customers who ever made that statement to you?

A. I will say that is the only one that made that particular statement.

(Testimony of DeGrey S. Brooks.)

Q. Is that the one who made the statement also that Paramount [295] was really just a trade name here, just using the trade name "Paramount"?

A. That is correct, sir.

Q. Separate and apart from those, you told the Court that several customers or former customers had told you Paramount was dissolving. Will you give us the names of any customers or former customers, or customer, who told you that anybody connected with Brewer said Paramount was dissolving?

A. Peasley Transfer Company, Mr. Davidson, Boise, Idaho.

Q. Where in Idaho? A. Boise, Idaho.

Q. Who else?

A. The manager of The Dalles Hotel in The Dalles.

Q. Who was it? Do you know his name?

A. I don't know his name.

Q. Who else?

A. I think that is all I can recall right offhand.

Q. Did anybody in Portland tell you that?

A. I didn't really do much in Portland. Mr. Fisher was working Portland and I was working out in the country on the Eastern run when I first came up to this job.

Q. Did you talk to Mr. Flanagan of Albers Milling Company? A. No, sir, I didn't.

Q. Whose deposition was taken the other day?

A. No, sir, I don't remember him now. [296]

(Testimony of DeGrey S. Brooks.)

Q. You spoke about the index cards. You said that some of these cards or as to some of these cards the dates did not appear; it did not appear on what date the customer was supposed to be serviced, is that it? A. That is right, sir.

Q. You do not want the Court to understand that there were some of the records of Paramount Pest Control Service that had been taken out of that office? A. They were not in the office.

Q. What records?

A. We had an index file in which we have a 5 by 7 card that is marked up by months, January, February, March and so forth, and every time a serviceman does a job he comes in and makes his report on his service card. The office girl will take that and post that on the index card so that when the man makes his rounds again he knows the last time he has been there or when it has been serviced, in order to keep our service uniform.

Q. Anyway, some of these cards at that time did not happen to show the date?

A. That is right, sir.

Q. You did not find any cards of any customers missing, did you?

A. Well, I wouldn't say, no. I can't remember no names.

Q. You said some of these cards had been dated up to September [297] and October. What did you mean by that?

A. There would be many cards with the name on it, the service contracts that we had on our books,

(Testimony of DeGrey S. Brooks.)

and the date of the last call would be September or October, which was two months prior to the time——

Q. You could understand by looking at it that those calls had not been made, of course?

A. I didn't know whether they were made this year or last year.

Mr. Bernard: I think that is all.

Redirect Examination

By Mr. Rankin:

Q. I should have asked you one other question. Referring to Exhibits 54 and 55, you have seen these before?

A. Yes. I don't know which ones you are referring to, though.

Q. Exhibits 54 and 55. A. 54 and 55?

Q. Who compiled these lists, do you know?

A. These lists are compiled in our office by the bookkeeper.

Q. Under whose direction?

A. Under my direction and also I would say Mr. Walt Moore who had something to do with them.

Q. Did Mr. Hilts have anything to do with them?

A. Sir?

Q. Mr. Hilts. There are letters in there marked "DeGrey [298] Brooks." Can you identify those as copies of the originals that you originally signed?

A. Yes, sir. Those are letters acknowledging cancellations of contracts.

(Testimony of DeGrey S. Brooks.)

Q. Generally speaking, wherever that name or initials appear, they are letters written by you, is that correct? A. That is right, sir.

Mr. Rankin: That is all.

Recross-Examination

By Mr. Bernard:

Q. Can you give me the name of the man who was supposed to have made these representations to the Sugar Bowl, the Peasley Transfer Company or The Dalles Hotel?

A. The names of the parties themselves?

Q. Yes.

A. They were the owners or the managers of these particular places. I don't know them personally by name.

Q. Did they give you the name of the person connected with Brewer? A. Never did.

Q. The name of the person connected with Brewer who made this statement?

A. No, sir, they didn't say which man it was. In one instance I believe Ray Rightmire's name was signed to a slip, a service slip, and that was in The Dalles, I believe. [299]

Mr. Bernard: That is all.

(Witness excused.)

HAROLD W. HILTS

having been previously duly sworn, was recalled as a witness on behalf of plaintiff and was examined and testified as follows:

Direct Examination

By Mr. Rankin:

Q. Mr. Hilts, you testified the other day to some eleven agencies of the Paramount Pest Control Service. Can you describe more in detail those agencies? You had not completed your statement about them.

A. Yes, sir. There are agents that we have operating under franchises——

Q. The franchises that you described, do they bear any resemblance to the franchise which was had by Mr. Brewer and dated July 1st, 1946?

A. Yes, sir, with the exception of the name of the manager or the man that it was franchised to, and the boundary lines, they are practically absolutely identical.

Q. How many franchises of that identical nature are in existence? A. Eight.

Q. Are there any franchise managers who have ever gone broke? [300] A. No, sir.

Q. Have any of them ever made any money?

A. Very definitely so.

Q. Can you give the Court a general idea of the maximum return that has been made under a franchise and the minimum return made under a franchise in your business?

(Testimony of Harold W. Hilts.)

A. The maximum amount of money that has ever been made by any one of our franchise operators, in round figures—I don't remember exactly, but it will run from \$22,000 to \$24,000 annually, a year.

Q. And the minimum?

A. The minimum amount of any one of our operators is upwards of \$6,000.

Q. Have any of those ever resigned or left you?

A. Not at all, sir.

Q. Never once?

A. Not of the eight. We had a resignation of a manager of ours who was operating in Sacramento who made \$14,000 in 1945, and he decided he wanted to become a missionary, so he resigned and left the organization.

Q. He was not broke when he left?

A. Not by a long shot.

Q. What kind of a contract was he under?

A. A franchise contract, the same as Mr. Brewer had.

Q. Mr. Brewer came up under a different kind of an agreement, [301] when he came here. What do you call it?

A. It was a franchise manager's contract.

Q. How many of those do you have in existence?

A. Now?

Q. Yes. A. Three.

Q. Have any of the franchise managers ever gone broke? A. No, sir.

(Testimony of Harold W. Hilts.)

Q. Have they made money?

A. Yes, sir, they have. They have made more than wages.

Q. Have you had any of those cancel out or leave the service?

A. Oh, occasionally one does.

Q. With particular reference to Mr. Osborn, did you inspect his books? A. Yes.

Q. Did you make an audit from them?

A. Yes, sir, I did.

Q. He has returned to Seattle?

A. Yes, he has.

Q. Do you know whether or not he is making money? A. Why, certainly he is.

Q. Was he ever broke as Mr. Brewer indicated the other day?

A. Not to my knowledge. I have never seen him broke.

Q. Have you continuously inspected his books?

A. His books have never indicated he was broke.

Q. Now, on the matter of damages, state whether or not you have prepared any statement that would indicate the obligations of Mr. Brewer to Paramount? A. Yes, we have.

Q. Page 14, Paragraph 6, subparagraph (1)(a) of the complaint alleges that there is a balance due Paramount from Mr. Brewer as of June 30, 1947, in the sum of \$3,100. Have you an exhibit that shows that obligation? A. Yes, there is.

Q. There is produced for your inspection Exhibit 36. A. Now, I have it.

(Testimony of Harold W. Hilts.)

Q. What is the total obligation shown by that?

A. \$3,359.61.

Q. Was there any payment on that?

A. Yes, there was a payment of \$259.61 on July 9, 1947.

Q. That is the payment you have previously described?

A. Yes.

Q. That left a balance of what?

A. \$3,100.

Q. Has that ever been paid?

A. No, sir.

Q. Paragraph 6, subparagraph (1)(b) of the complaint is an allegation of a balance due under the franchise for July, 1947. Did you prepare any exhibit to disclose that?

A. Yes, sir, I did. [303]

Q. What is that exhibit? You might look at Exhibit 39.

A. 39?

Q. Yes.

A. It must be out of order. I can't seem to locate it.

Q. Here it is, right here.

A. Thank you.

Q. What does that show?

A. Shows the total amount due, \$478.15, based on the franchise contract for July, 1947.

Q. For what month?

A. July.

Q. For the month of July, 1947?

A. Yes.

Q. Where did you get that figure?

A. From the books.

Q. Whose books?

A. From Mr. Brewer's books, the books in the Portland office.

(Testimony of Harold W. Hilts.)

Q. Has that amount been paid?

A. No, sir.

Q. There is a claim here, one for difference between the investment, and the other for fixed assets not turned in as per contract. Are those on the same basis? What about those claims? Look at Exhibits 50 and 51 and explain it to the Court, please.

A. Exhibit 50 is the total amount of assets on the records, less depreciation. The depreciation is figured on the accounting rules [304] set forth by the Federal Government. 51—

Q. 51. I am in error. I have not reached that yet. Explain these two claims, for \$259.63 and \$973.30, as to whether or not they are obligations of Brewer and, if so, how?

A. \$259.63 and \$973.30 interwind with each other. The \$973.30 represents the equipment that was not turned in by Brewer as per his contract.

Q. Have you any exhibit on that?

A. Yes, sir.

Q. What is the exhibit number? Is it 50?

A. Yes, it is. It is the next half of 50.

Q. Have you anything further to state in regard to that?

A. It shows on the exhibit, the second half of Exhibit 50, that there was a 1936 Plymouth car, a "Hi-Fog" exterminator and service unit, a spray rig and a two-wheel trailer, also the additional cost of trailer and one Dobbins pump, single-phase, that

(Testimony of Harold W. Hilts.)

are all recapped in the figure \$973.30. That is, of course, the book value which means the depreciation is figured and figured in as expenses.

Q. The fifth item on page 15 of the complaint, Paragraph 6(e), refers to an expense account of certain items. You say those items amount to what?

A. \$925.89.

Q. Have you an exhibit to disclose that?

A. Yes, it is on Exhibit 51. [305]

Q. Explain why that is a charge here.

A. The reason for this being a charge is because they are unsupported expenditures. In other words, checks were drawn, as the exhibit indicates, the check number and the date on which drawn and to whom they were paid, but with no supporting evidence of the expenditure. Therefore, according to accounting procedure, when there is no supporting evidence, they have to be charged. If there is no supporting evidence, it is charged to the owner of the business as his drawing account, under accounting practice.

Q. The next item on page 15 of the complaint, Paragraph 6(1)(f), evidently relates to the Eastern Oregon run. You have testified about this Eastern Oregon expense and the agreement?

A. Yes.

Q. Does this relate to expenditures incurred in the performance of that agreement?

A. Not expenditures, but the income.

(Testimony of Harold W. Hilts.)

Q. Describe it then, in detail.

A. This one, amounting to \$678.50, is one-half of the income that was derived from the Eastern Oregon run as per Mr. Brewer's understanding of a split of the income and expense of that venture, putting on new business. The expense item is shown under the June 30th settlement of \$3,100 and the income we had never received which we were entitled to, and therefore it is in this item.

Q. What exhibit discloses this obligation?

A. Exhibit 51.

Q. Exhibit 51-A, does that have any bearing on it? Does Exhibit 40 or 40-A?

A. 40 and 40-A do not. I will see what 51-A shows. Yes, 51-A indicates the amount of revenue derived from the Eastern Oregon run for the months of February, March and April, giving the number of accounts handled and also the total volume for those months.

Q. (By Mr. Bernard): 51-A?

A. Yes, 51-A.

Q. (By Mr. Rankin): No. 51, does that have any bearing on it?

A. No, sir, 51 is the \$925.89 unsupported.

Q. 51-A is the only exhibits which sets out in detail this Eastern Oregon operation?

A. Correct.

Q. Page 16, Paragraph 6(2)(a), does that explain that? A. Which one is that?

(Testimony of Harold W. Hilts.)

Q. Paragraph 6(2)(a), which reads, “ * * * plaintiff sent men into said territory to interview and hold such accounts as plaintiff could and the action of said defendants, as herein described, damaged plaintiff in the amount of said expense, consisting of \$3,596.95.”

Please explain that, will you?

A. Well, when we found out what had actually happened to us, [307] what had really been done, we had to protect our business, naturally, as any business organization would.

Therefore, we had to import people into the area, experienced men and people familiar with the business, to carry on, and also determine just exactly where we did stand, as far as our accounts were concerned.

We are a service organization. We do not sell a commodity. Therefore, our business is erected around our personnel, and whenever we realize in our business that our personnel is *in way* not right in relation to the customers, then we try to determine what the situation is and, therefore, under the situation that we ran into here in Portland, we were naturally anxious to find out just as soon as possible from all of our customers just where we stood, which has been borne out in earlier testimony. This is the amount involved in bringing people that were necessary here to find this out and to protect our accounts and our business.

Q. Have you made an exhibit for that?

A. Yes.

(Testimony of Harold W. Hilts.)

Q. Have you detailed in that exhibit what the expenditures were for? A. I believe so.

Q. Look at Exhibit 53 and see if it covers every item that you have mentioned covering expenses in an effort to hold the business? [308]

A. Yes, it indicates my time and that of Andy LePape, Carl Dolby, W. T. Moore, DeGrey Brooks, whom we brought from Spokane, and Mr. Fisher who happened to be here and of course went right on our payroll, and Mr. Elfers whom we brought from Seattle, Mr. Sibert and Mr. G. H. Fisher.

Q. Is that total set forth in Exhibit 53?

A. Yes. The total is set forth. It is set forth in detail, in fact. It indicates the expenses for hotels and meals and automobile expenses necessary to carry on.

Q. How much does that amount to?

A. A total of \$3,596.95.

Q. The next item on page 16, Paragraph 6(2) (b), having to do with contracts having a balance of the year to run. There are in evidence here lists contained in Exhibits 54 and 55 of the contracts that were canceled. Some of these contracts that they had some time to run.

The Court: Recess until 1:30.

(Thereupon the Court was recessed until 1:30 o'clock p.m.) [309]

(Testimony of Harold W. Hilts.)

Court Reconvened at 1:30 o'Clock P.M.

January 23, 1948

Direct Examination

(Continued)

By Mr. Rankin:

Q. Have you the list of accounts?

A. Yes.

Q. You spoke to me during the noon hour of something you wanted to make clear. What was that?

A. I wanted to be clearly understood—I don't think I have made it quite clear—relative to Item 3 of damages. Item No. 3 is contained in Item 4.

Q. So, in place of \$259.63 and \$973.30 there is just the item of \$973.30?

A. That is right.

Q. When we recessed at noon we were about to discuss Paragraph 6(2)(b), on page 16 of the complaint, relating to contracts having a balance of one year to run. Have you Exhibit No. 54?

A. Yes, sir.

Q. Who compiled Exhibit 54?

A. I did.

Q. What does it show as to total?

A. Shows a total of \$4,596.75.

Q. That is \$4,596.75?

A. Yes. [310]

Q. What is that figure?

A. That figure represents contracts that were still in effect and had time to run, after Mr. Brewer's action, and which we lost.

Q. How long did they have to run?

(Testimony of Harold W. Hilts.)

A. Various times. They are enumerated there, the account number, the date of the contract, the amount of the monthly charge, and the balance of the term of the contract, also the balance of the amount of revenue that would have been involved in it.

Q. State whether or not this \$4,596.75 represents the face of the contracts? A. Yes, it does.

Q. Does it represent the amount of profit that Paramount Pest Control Service would have received? A. No, sir.

Q. Can you figure the amount of the profit that Paramount Pest Control Service would have received under those contracts that were canceled within the year?

A. Yes. According to our experience rating and the way our business is set up to operate, we could expect 40 per cent profit on the face of these contracts.

Q. How much does it take to process or serve these contracts? A. 60 per cent.

Q. Is that the accepted standard in your business, or is that [311] something exceptional that you are applying to this case?

A. Not a bit exceptional. It is more or less standard. Sometimes it varies a few points one way or the other.

Q. That is, the total amount, \$4,596.75 represents the face; so far as profit is concerned, it would be 40 per cent of that that would be returned to Paramount? A. Yes, sir.

(Testimony of Harold W. Hilts.)

Q. How many contracts is that figure based on?

A. I have not counted these contracts. I can say that this item, \$4,597.75, and the next item, \$566.50, represent a total of 185 accounts.

Q. How many of those contracts are admitted by Mr. Brewer in his answer to have been taken over by him? A. 141.

Q. What are those additional contracts in that \$4,596.75 item that are not admitted by him?

A. Well, there is quite a number of them—44, to be exact, such as Schuster Brothers.

Q. You need not go through an enumeration of the 44. You have testified the cost of those is 60 per cent. Can you break down that 60 per cent any further? A. Yes.

Q. How?

A. Figure in 60 per cent an average of 38 per cent being for servicing the contracts and 22 per cent being for the overhead [312] operation of the business.

Q. Give a general statement, not too much in detail, as to what is included in overhead.

A. Well, in overhead there is the office girl, advertising, telephone and telegraph, insurance, taxes and licenses, depreciation and quite a number of other items——

Q. That is sufficient.

A. If you will let me refer to the exhibit, I can enumerate them all.

(Testimony of Harold W. Hilts.)

Q. They will inquire further if they wish. Does that overhead continue in spite of cancellation of contracts? A. Yes, sir.

Q. Who paid the overhead?

A. Well, during Mr. Brewer's contract Mr. Brewer paid for it. During our contract, we paid for it—After Mr. Brewer left us, we had to pay for it.

Q. What do you include in the 38 per cent service?

A. There is wages for servicemen, materials and chemicals to be used on the job, traveling expenses, such as hotels, rooms and meals.

Q. As to these contracts, you say after his severance you paid the overhead. How about the service? Did you service these contracts afterwards?

A. No, sir, but we had to have personnel servicing these contracts. [313]

Q. Who took the servicing of the contracts over?

A. We did. We had our organization here.

Q. Yes, but who actually serviced them?

A. Mr. Brewer was servicing the contracts.

Q. Then, in that \$4,500 item, or practically \$4,600 item of damage, all that you were relieved of was the service or 38 per cent?

A. That is correct.

Q. Take the next item on page 16, paragraph (c), contracts exceeding one year to continue on a per-month basis. Pardon me just a moment. Strike that.

(Testimony of Harold W. Hilts.)

That \$4,596.75 item broken down to 38 per cent of that is contained in what exhibit?

A. It is contained in Exhibit 54.

Q. Now, take the next item, contracts exceeding one year to continue thereafter until completed, under the terms of the contract on a month-to-month basis. How many of those did you find that had not expired?

A. How many contracts?

Q. The amount of them is more important.

A. \$566.50. That is just the monthly service involved in those contracts.

Q. Is that set forth in any exhibit?

A. Yes, sir, it is Exhibit No. 55.

Q. Over and above these items, can you advise the Court whether [314] or not the business in general suffered a damage? A. Yes, sir.

Q. What kind of damage, and can you give an estimate of how much?

A. Well, we suffered a damage of approximately \$1,500 per month, in round figures. We feel that, according to our experience rating, over a period of years' operation, that the accounts which stay on the books over a period of years run 60 per cent, that the customers we retain is 60 per cent. Therefore, on the basis of 60 per cent of \$1,500 would be about \$900 and, taking into consideration the balance of the term of the contract, which would have been eight years and eleven months, we have suffered a damage I feel of \$96,300.

(Testimony of Harold W. Hilts.)

Q. That is over the entire period of time?

A. Yes, sir.

Q. There is a claim by Mr. Brewer of some \$700 and another of some \$1,350. Did you take credit on those into consideration?

A. Yes. That totals about \$2,050, and we have allowed for that.

Q. How?

A. Well, there was the amount of money that Mr. Brewer received and had taken out of the business.

Q. You heard the testimony the other day when he said he had taken out \$1,000 of investment, and how much more? [315]

A. Well, he had taken out approximately, according—According to the records he has taken out over \$4,500.

Q. How much was left in the bank on August 1, 1947, when Mr. Brewer started in for himself, in the account of Paramount Pest Control Service?

A. In accounts receivable?

Q. No, in the bank account.

A. In the bank account?

Q. Yes.

A. Oh, right around \$4.00. There were two bank accounts. One of them was the payroll account and the other was the general account and the total amount left in the bank in these two accounts was around \$4.00.

(Testimony of Harold W. Hilts.)

Q. How much did he draw in July, 1947, do you know?

A. Over \$1,000, \$1,017 and something.

Q. Some time at the beginning of this trial, Mr. Sibert mentioned Mr. Brewer's visit to his home when he purchased airplane tickets for Mr. Brewer, and Mr. Brewer says he purchased those himself.

Will you, very quickly, give a statement as to whether you looked that matter up and what you found?

A. Yes, I checked the checks which Mr. Brewer claims in his testimony had been drawn for these airplane tickets. There are three checks. In fact, one of them was to pay for a tire and the other one was for \$50, and the other one was for \$100. [316] The one for \$100 was drawn the day after Mr. Brewer had left Portland for Oakland.

Q. Are these the three checks mentioned by Mr. Brewer?

A. Yes. They are numbered 398, 399 and 400.

Q. Did you look up the record as to the airplane tickets that were purchased?

A. Yes, sir. They were purchased by Mr. Sibert from his personal credit, and I happened to be present when he was doing so.

Q. Were they billed to Mr. Sibert?

A. They were billed to Paramount Pest Control Service. This credit is in the name of Mr. Sibert of Paramount Pest Control Service.

(Testimony of Harold W. Hilts.)

Q. The Paramount Pest Control Service paid for them, according to the record?

A. Yes, sir, they did.

Mr. Rankin: You may cross-examine. I do not believe it is necessary to introduce these records. They are available if counsel cares to see them.

Mr. Bernard: May I have Exhibit 36?

Cross-Examination

By Mr. Bernard:

Q. Can you tell me, in round figures, the gross amount of business done by the Portland—I will call it the Portland branch office—in the thirteen months Mr. Brewer was here? [317]

A. Not without looking at the records. I believe it would run upward of \$35,000.

Q. Mr. Brewer stated it would run, in round figures, \$35,000. Do you think that is substantially correct? A. I think it is pretty close.

Q. You were here how often during those thirteen months? I will say, prior to July 1, 1947?

A. Well, I was here in May, in April and March, in January, December, November and October and again in May of 1946 and April of '46. I brought Mr. Brewer up here around the 1st of April, 1946.

Q. Mr. Brewer has testified nobody connected with the company ever made any complaint with the way he was handling the business. Did you ever make any complaint to him about the way the business was being conducted?

(Testimony of Harold W. Hilts.)

A. I did not complain to him. I tried to show him on various occasions how it could be operated more profitably.

Q. In what way?

A. It is not my policy to complain.

Q. What suggestions, generally, did you make to him?

A. Well, in the line of expenses and in the way of help and taking the men in and seeing that they got started correctly so that it is inexpensive.

Q. Did you think he had to have help or use help in the Oregon district? [318]

A. Yes, at various times he did.

Q. How many men do you think he should have had?

A. It would depend on the volume of business and that changed from month to month.

Q. What was the greatest number of help Mr. Brewer had at one time?

A. I really don't know, offhand.

Q. His territory took in all of Oregon?

A. That is correct.

Q. You said Mr. Brewer drew around \$4,500 during the year. How was that made up, Mr. Hilts?

A. Well, he drew over \$2,500 the last seven months of 1947; he drew \$1,000 the last six months of 1946.

Q. He drew what?

A. There may be a correction. I might have said the last part. I meant the first seven months

(Testimony of Harold W. Hilts.)

of 1947 he drew over \$2,500; the last six months of 1946 he drew over \$1,000, and that is shown on the record of drawings.

Then there was an additional amount of \$925 of unsupported expenses that we considered was a drawing.

Q. On Exhibit 36 it shows "Brewer drawing, \$2505.55." What period of time does that represent?

A. From January 1st, 1947, to June 30, 1947.

Q. That just covers the period of six months?

A. That is correct. No, I beg your pardon. I am wrong there. [319] It covers the period of from July 1st, 1946, to June 30th, 1947. I would like to have that exhibit to refresh my memory. I can't remember figures too well.

Q. This exhibit purports to cover a year instead of six months?

A. That is correct.

Q. It says here "Plus Brewer drawing, \$2505.55." What does that figure represent?

A. That figure represents his drawings record on the books from July 1, 1946, to June 30, 1947.

Q. One year?

A. That is correct.

Q. You say, then, he drew in July, 1947, how much?

A. Over \$1,000.

Q. The only other item which you add to that is this \$925 which you say is unsupported by vouchers?

A. That is right.

Q. Was he repaid the \$1,000 that he put in at the start?

A. He was repaid in the \$4,500.

(Testimony of Harold W. Hilts.)

Q. Well, did he withdraw any \$1,000 in addition to this \$2,505.55 and \$1,000 in July?

A. I don't know.

Q. The point I am making is: If he was repaid the \$1,000, it has to be deducted from the amount of these drawings that you have shown here.

A. That is right. [320]

Q. If we deduct the \$1,000 from the amount he withdrew in July, the total amount Mr. Brewer drew during the life of the contract would be \$2,505.55; plus any balance over and above \$1,000 in July, 1947, and any portion of this \$925 which is properly charged against him?

A. Yes, and we only got \$994.

Q. What do you mean by that?

A. That is all we ever got out of it.

Q. Well, where did you get that?

A. That was the amount of the January and February, 1947, franchise, total \$994.25.

Q. How much money have you—When I say “you” I mean the Paramount Pest Control Service—collected on contracts since August 1, 1947; I mean contracts that existed prior to that time on work done by Mr. Brewer?

A. Less than \$1,500.

Q. Can you give us the exact figure?

A. No, I can't exactly. That is right around under \$1,500. I don't know exactly the figure.

Q. About \$1,500?

A. That is right.

Q. There was paid to you how much, by Mr. Brewer?

A. I didn't understand.

(Testimony of Harold W. Hilts.)

Q. There was paid how much by Mr. Brewer?
You say \$900-odd? A. \$944.25. [321]

Q. So you have received \$994.25 plus about \$1,500?
A. That is right.

Q. That is correct?

A. There was also another payment made on the settlement of \$259.61. I didn't take that into consideration when I answered you.

Q. Anyway, you have received, in addition to the amount set forth here that he was given credit for, you have received approximately \$1,500 in addition to that?

A. I don't get your question. I am sorry.

Q. There are certain payments that it is conceded in the pleading and by everybody that Mr. Brewer made. In addition to those, Paramount Pest Control Service has received about \$1,500 in collections since this trouble started?

A. In round figures, I think.

Q. On Exhibit 36— and any time you want this let me know and I will hand it up to you——

A. Yes.

Q. ——is an item "Bills due Oakland as of date, \$533.65." There is a circle with a cross in it after that figure. Do you remember who put that in?

A. Yes. I put that in.

Q. For what purpose?

A. Those are bills that Mr. Brewer acknowledged that he owed Oakland. [322]

Q. I mean this mark.

A. That circled asterisk?

(Testimony of Harold W. Hilts.)

Q. Yes.

A. We have the same thing down below.

Q. What was the purpose of writing that in?

A. To tie it in to a number of invoices.

Q. Didn't Mr. Brewer tell you at the time he had some question about that amount?

A. No, not at all. He conceded it.

Q. He conceded this amount entirely?

A. Absolutely. He conceded the whole thing and made a payment on it.

Q. Exhibit 39 is an exhibit showing an account as of July, 1947. You have "Monthly control service, \$2,585.05." Is that the total amount of the charges for monthly service whether or not the collections had been made?

A. I don't know unless I can refer to the exhibit.

(Exhibit No. 39 shown to the witness.)

A. Now, your question again, please?

Q. (By Mr. Bernard): You have a total amount of business done, whatever the figure is, the first three items. What do they total up to?

A. \$2,645.55.

Q. Is that the total amount of business done or the total amount of money collected? [323]

A. That is the total amount of business on the books.

Q. In arriving at the amount due Paramount Pest Control Service, you have taken 20 per cent of that amount? A. No.

(Testimony of Harold W. Hilts.)

Q. Less one or two credits?

A. Less allowances that were written off the books during the month of July of \$254.80. We claimed 20 per cent of the balance, \$2,390.75, which is \$478.15.

Regardless of whether or not the money had been actually collected?

A. That is correct. These are franchise routes.

Q. I know they are franchise routes, but if you will answer the question, please.

A. You bet I will.

Q. Maybe you will remember this exhibit. Exhibit 51 is the list of the expenditures not verified, totaling \$925.89. As I understand, you have charged those to Brewer in addition to the other drawings because you could not find any supporting vouchers, is that correct?

A. Yes, sir.

Q. You, yourself, of course, have no way to know whether or not that money was spent as legitimate expenses in connection with the business or whether he spent it on himself?

A. The only way we can determine, if there is expense in the record for it, is that he made out expense accounts for other [324] items he has paid and charged it to expenses. If there was no supporting evidence, the only thing we can do is come to that conclusion.

Q. I didn't ask you that. I said you, yourself, have no personal knowledge as to where any of this money went, have you?

A. No.

(Testimony of Harold W. Hilts.)

Q. Is that correct? A. No, it is not.

Q. What? A. I don't know.

Q. Now, I refer to Exhibit 53 in which you list the expenses of the business as \$3,596.95. What is your salary with the company?

A. I didn't understand.

Q. What is your salary with the company?

A. \$5,200 a year.

Q. On this exhibit you have "R. W. Hilts, Time, \$350." Was that in addition to your salary or merely a proportion of the time with reference to the salary which is put in here?

A. It represents the time that I put in here.

Q. The company did not pay you any additional salary? The company did not pay you any additional salary, did they, by reason of your coming up to Portland?

A. Not in this particular case, no. [325]

Q. Who is Andy LePape?

A. One of our men.

Q. What is his salary?

A. I don't remember exactly. The computations are there.

Q. It says \$250 here.

A. That is what it is then.

Q. That is his salary with the company, at that time? A. Yes.

Q. Was he paid any additional salary by reason of coming up to Portland? A. No, sir.

Q. Carl Dolby. Who is Carl Dolby?

A. One of our men.

(Testimony of Harold W. Hilts.)

Q. It says here \$253.84. Was he paid any additional money by reason of coming to Portland?

A. No, sir.

Q. W. T. Moore, \$103.87. Who is W. T. Moore?

A. One of our men.

Q. Was he paid any additional compensation by reason of coming to Portland? A. No, sir.

Q. DeGrey Brooks, \$207.75. Was he paid a salary? A. Yes, sir.

Q. Was he paid any additional salary by reason of coming to Portland? [326]

A. No, sir.

Q. C. W. Fisher.

A. He was not with the company at the time. He went on the payroll immediately upon arriving.

Q. How long had it been since he had been with the company prior to August 1st?

A. A matter of a few months.

Q. How long did he work? A. A month.

Q. A month?

A. Yes, in and around the territory. He was not here in Portland a month. He was traveling around the country,—around the territory, rather.

Q. Who is Mr. Elfers?

A. Also one of our men.

Q. You have got him down here for \$220. Was he paid any additional salary by reason of coming to Portland?

A. No, sir. We had to pay other expenses, though, to cover all of these men.

(Testimony of Harold W. Hilts.)

Q. Exhibit 54 in an exhibit which is headed "Canceled accounts with time to run as per contract."

What did you do in making up this exhibit, put in all the contracts that had been canceled since August 1st?

A. Only those contracts that were canceled because of Brewer's action. [327]

Q. How did you determine they were canceled because of Mr. Brewer's action?

A. There is an exhibit attached to that, the contract itself, plus, I believe, supporting detail as to the customers and, in some cases, the reasons, where they were contacted personally by the men and they brought that information back with them in submitting the canceled accounts by the medium of the cancellation slip which is attached, I believe, for both of these exhibits.

Q. How did you determine, in making up this exhibit, that Mr. Brewer was responsible for canceling any particular contract?

A. Any accounts that were canceled at the time, right after the beginning of August 1st, 1947, were put aside specifically for that purpose, and we scheduled them and we knew what they were.

Q. Under this heading "List of accounts that were on books longer than a year and canceled only because of Brewer action," on Exhibit 55, that, as we understand it, is the total amount that the customers would have been called upon to pay if the contracts had run their time, is that correct?

A. That is correct.

(Testimony of Harold W. Hilts.)

Q. And then you said you figured you were entitled to 40 per cent of that?

A. That is correct. [328]

Q. If all that money had been collected by Mr. Brewer after July 1st and the work done by him, how much would Paramount Pest Control Service have received on it?

A. If it had been collected by Mr. Brewer?

Q. No. You have here that there would have been collected, if the contracts had run their course, \$4,596.75. If Mr. Brewer had succeeded in performing these contracts under his license, how much would Paramount Pest Control Service have received?

A. We would have received, under the agreement, 20 per cent should the agreement cease to exist. Therefore, we would have received 40 per cent.

Q. In other words, you are claiming twice as much as you would have received if he had gone on under his license?

A. That is correct, but he did not go on.

Q. As I understand it, you also said you figured you were entitled to \$1,500 a month damages. That would be \$18,000 a year. How do you figure that?

A. I didn't say that.

Q. Tell me what you did say.

A. I said we figured our damages amounted to \$1,500.00 a month, and that we could retain under the terms of the contract, on an experience rating,

(Testimony of Harold W. Hilts.)

60 per cent of all customers that are on our records and, therefore, our damage is about 60 per cent over the term expiration of the contract.

Q. 60 per cent of what? [329]

A. 60 per cent of \$1,500 per month for nine years, for eight years and eleven months.

Mr. Bernard: I think that is all.

Redirect Examination

By Mr. Rankin:

Q. Counsel asked you about \$1,500 that you received as payment on the contracts after August 1st?

A. Yes, sir.

Q. Did you have to service those contracts?

A. Yes, sir.

Q. Exhibit 54 contains a list of contracts canceled. Counsel asked you why you attributed those to Brewer. State whether or not you compared those canceled contracts with the answer that Mr. Brewer filed in regard to the interrogatories?

A. Yes, sir, I did.

Q. And did Mr. Brewer confirm those cancellations by saying that he had taken over the contracts?

A. Yes, sir.

Q. Counsel also inquired of you whether or not these men were paid a regular salary or were paid anything additional. Would any of those men have been doing the work of saving the company's business in Oregon had Mr. Brewer not left the company and canceled the contracts and then continued his service?

(Testimony of Harold W. Hilts.)

A. No, sir. We would have received revenue from their operations elsewhere in our organization.

Q. Did you give Mr. Brewer an opportunity to explain the vouchers in that item of the exhibit that has to do with the unsupported charges or withdrawals? A. No, not at that time.

Mr. Rankin: All right. Thank you.

Recross-Examination

By Mr. Bernard:

Q. Maybe in one of my questions I did not make myself clear. When Mr. Brewer left on August 1, 1947, there were some amounts owing for work which had already been done by him? I mean, on the books? A. Yes, sir.

Q. How much of that has been collected by Brewer's Pest Control?

A. By Brewer's Pest Control?

Q. By the Paramount Pest Control Service, yourselves? A. Around \$1,500.

Mr. Bernard: That is all.

Redirect Examination

By Mr. Rankin:

Q. Did you service the contracts from which you received that money?

A. We serviced them afterwards, but not before.

Mr. Rankin: All right; that is all.

(Witness excused.) [331]

GLENN H. FISHER

was thereupon produced as a witness on behalf of plaintiff and, being first duly sworn, was examined and testified as follows:

Mr. Rankin: If the Court please, at the time I offered this one deposition of Mr. Flanagan, I anticipated using others along the same line, or I would not have offered the one little deposition. To expedite this case, I think we can dispense with these others, so I place no particular stress upon that one little deposition.

Direct Examination

By Mr. Rankin:

Q. You are a little hard of hearing, aren't you, Mr. Fisher? A. Slightly.

Q. Give your name to the Court.

A. Glenn Harold Fisher.

Q. Where do you live?

A. 6600 Dawes Street, Oakland, California.

Q. About how long have you lived there?

A. About two and one-half years.

Q. What is your occupation?

A. Pest control.

Q. How long have you been in the pest control business? A. Since 1935.

Q. Are you the Glenn Fisher mentioned as one of the partners in the original Paramount Pest Control Service with Mr. Sibert? [332]

A. I am, sir.

(Testimony of Glenn H. Fisher.)

Q. When did you first meet Mr. Brewer?

A. In the early part—I would say in the first week of January, 1946.

Q. What was the occasion of your meeting him?

A. He was in Mr. Sibert's office, talking to him, I think at that time, in regards to being employed by us.

Q. Do you segregate any departments in your corporation for any one individual to supervise?

A. Yes, we do.

Q. Have you a particular department that you give your attention to?

A. Yes. My real function in the organization is contacting our personnel, our managers, throughout the territory.

Q. Did you have anything to do with Mr. Brewer in that regard?

A. No, I didn't.

Q. Did you have, at any later date, any occasion to confer or discuss any phases of the business with Mr. Brewer?

A. What do you mean by a later date?

Q. After this January meeting when you first met him for the first time?

A. Yes. In February, I think it was the forepart of February, that same year.

Q. What was the occasion and what did you do?

A. I was having a conversation or conference with Mr. Sibert [333] and we had decided something would have to be done with the Portland territory, and we discussed at great length the possi-

(Testimony of Glenn H. Fisher.)

bilities and what we should do about it, and about that time we decided that Mr. Brewer, whom I had met about a month previous, would be the man. We were preparing to call him and we got a buzz from the front office that he was out in the front office waiting. It was entirely a coincidence.

Q. Did you discuss the matter with him?

A. I did.

Q. Just tell what transpired.

A. We called him back and talked to him about the territory, and he had previously expressed his desire, if he came to work for us, to come to this general territory, and he wanted to know something of these agreements that we had with our employees, so we told him there were two, a managership agreement and also a franchise agreement, and, in order to better explain them to him, I got a copy of each from our files and we sat down right across the table and we took those paragraphs more or less paragraph by paragraph and, if he had questions to ask, I tried my best to explain it to him.

Q. When was this, please?

A. This was in February, the forepart of February.

Q. What year? A. 1946.

Q. Did you at that time explain to him the franchise agreement, [334] a franchise agreement in the same form as that which he signed on July 1st with you?

(Testimony of Glenn H. Fisher.)

A. Yes. With the exception of the name of the agent, the territory and date, I would say they were verbatim.

Q. Did he come up immediately on that franchise?
A. No, he didn't.

Q. What did he come on?

A. Well, he came on our promise of a managership agreement.

Q. Did he sign a managership agreement?

A. Not at that time.

Q. Did he later sign one?
A. Yes, he did.

Q. When?

A. In Portland, Oregon, after I came up some two or three days later.

Q. At the time he came to Portland, had you gone over both contracts with him?

A. Definitely.

Q. Did he take them to any lawyer or any place that you know of?

A. No, I don't know as he did. I oftentimes suggest that they might, but I don't know as I did this time. Possibly could have.

Q. Did he take that away with him?

A. Yes. [335]

Q. Take them away, I should say.

A. Yes.

Q. What did he do with them, if you know?

A. He took them home. I told him, "Take these home and study them. There may be something else come up, because this is a very important business

(Testimony of Glenn H. Fisher.)

for us and we feel it should be an important venture for you, and it is very essential that we have a perfect understanding."

Q. When he returned them, did he make any further inquiry about them?

A. No, I don't believe he did.

Q. Did he ask you anything about them then?

A. No, he never asked me.

Q. Where did he sign the manager's contract that you mentioned?

A. In Portland, Oregon, after I came up.

Q. About what time?

A. That would be about March 4th or 5th, right shortly after the first of March.

Q. How did you handle the execution of this franchise, July 1, 1946?

A. I beg your pardon?

Q. It bears your signature and Mr. Brewer's signature. Would you tell the Court how that was handled in its execution?

A. Well, I had talked to Mr. Brewer at the time of his coming [336] north. He didn't wish to come north without a contract and he wanted a franchise contract, but I explained to him that possibly for a month or two or three he would be better off from a financial standpoint to go on a managership agreement, and he said he could get along on \$250 a month, and that was the agreement he went on, and if the business prospered and was handled correctly he would naturally, under that agreement, be able

(Testimony of Glenn H. Fisher.)

to earn more than \$250 a month, so I had more or less set the 1st of July, which was about three months from then, as a good time for him to go under our regular franchise agreement, due to the fact that we were in the process of incorporating our business, making us a corporation rather than a partnership, and at that time we could go into our regular franchise agreement with him as a corporation, and it was very agreeable to him.

Q. Where did you sign that franchise of July 1st, 1946? A. In our Oakland office.

Q. Had Mr. Sibert signed it then?

A. No, he hadn't.

Q. I don't mean Mr. Sibert. I mean Mr. Brewer. Had Mr. Brewer signed it then?

A. No, he hadn't.

Q. What did you do about getting his signature?

A. I sent him two copies in the mail—I signed two copies and put them in the mail and sent them to Oregon to Mr. Brewer [337] in Oregon for his signature.

Q. When did you do that?

A. That would be in July, the forepart of July or, rather, possibly the latter part of June, somewhere along in there.

Q. How long was it before you got them back?

A. Oh, I would say a week, approximately the time that it would take the mail to come up and be returned.

Q. Did you get them both back or one?

A. One, my copy.

(Testimony of Glenn H. Fisher.)

Q. When you received it back, was Mr. Brewer's signature on it? A. Yes, it was.

Q. When did you again see Mr. Brewer?

A. From what date, sir?

Q. Any time after July 1, 1946, any time after July 1st?

A. July 1st, 1946. I was just trying to think, Mr. Rankin.

Q. Let me get at it this way: When did you again come to Portland, Oregon, after July 1st, 1946?

A. I believe it was in August I came through here on my vacation and just merely stopped off as I was going through.

Q. When did you again come on any business trip?

A. Never came on another business trip until after the breach of this agreement.

Q. Did you see Mr. Brewer in Oakland in November, 1946? A. Yes, sir. [338]

Q. Where did you see him?

A. In Mr. Sibert's home.

Q. Mr. Brewer claims he came there with his wife in protest against your treatment of him in the Oregon territory. Did you have any conversation with him about the business in Oregon?

A. Not other than "How are things going?" And he seemed to be very well satisfied. He had an expression which he used at that time. He said, "It is the best in the West." That is the way he was explaining to me how he felt things were going in Oregon.

(Testimony of Glenn H. Fisher.)

Q. I believe the testimony shows that you were here in June, 1947. No, I beg your pardon. I believe the evidence shows that were again in Mr. Sibert's home in June, 1947? A. That is true.

Q. Did you see Brewer then?

A. Yes, I saw Mr. Brewer at that time.

Q. Did you discuss the Oregon business with him then?

A. Well, it was almost identical. I travel a great deal and, as I remember, on that trip I was just returning from Los Angeles. I heard Mr. Brewer was in town so I dropped in to visit a while on my way home.

Q. From the time you met Mr. Brewer until this June meeting in 1947 in Mr. Sibert's home, had he ever told you or anyone connected with the company in your hearing that he was going [339] to drop this business, this franchise?

A. No, sir. When that happened, we were all very much dumbfounded. We could hardly believe it.

Q. Was there anything in any of his conduct at any time that gave you any warning that he was terminating his agreement?

A. Not in my presence, no, sir.

Mr. Rankin: You may cross-examine.

Cross-Examination

By Mr. Bernard:

Q. At the start of your examination you said it had been decided something had to be done with the Portland office. Is that correct? A. Yes.

(Testimony of Glenn H. Fisher.)

Q. Whom did you discuss that matter with?

A. Mr. Sibert, Mr. Hilts, I believe, and—At least Mr. Sibert and myself.

Q. What was the reason that something had to be done with the Portland office?

A. Well, it just so happens that the former employee is in the courtroom today, so I will *be speak* very frankly. We felt that the business was not being *taken of* adequately; there were complaints, particularly from our largest customer, the Southern Pacific Company, and when I came up here this former employee said, "Mr. Fisher, I don't blame you. I expected it several months ago."

Q. In other words, conditions in the Portland office were not satisfactory?

A. As far as service was concerned.

Q. When you saw Mr. Brewer, you discussed both forms of contracts with him?

A. That is true.

Q. The manager's contract and the franchise form of contract? A. That is true.

Q. Was it in California that you claim to have turned over copies of them to him?

A. That is right. It was in Oakland.

Q. You say that he took those away from the office? A. That is true.

Q. How long did you say he had them?

A. I would say two or three days. It seems to me—I wouldn't be positive, but it seems to me like this was along the latter part of the week and he

(Testimony of Glenn H. Fisher.)

was to come to work Monday morning. I believe he took them home with him over the week end and familiarized himself with them.

Q. That was before he had done any work in pest control? A. That is true.

Q. You knew that he was totally ignorant of the pest control business?

A. That is right, other than what conversations we had had prior to giving him the contract and talking contract, as we [341] always do to a man that has no understanding of any of this business; we would explain the thing, the nature and type of our work, and tell him about the dirty part of it as well as the good part of it, so he can make up his mind as to whether he considers himself the type of a person that would adapt himself to this business.

Q. Did he want to sign a contract before leaving Oakland? A. For Portland?

Q. Yes.

A. He desired to sign a contract. He didn't—He said he didn't want to go anywhere without having a contract and at that time he wanted the franchise contract.

Q. Why didn't you have him sign a contract before he left Oakland?

A. Because at that time our former manager had not been notified of our decision to replace him, and I felt that that would be getting the cart before the horse to have one man have a contract in a district where another man already had a contract.

(Testimony of Glenn H. Fisher.)

Q. So he came up here with no written contract at all?

A. That is true, but with the promise of one.

Q. After he got here he signed what was known as the manager's contract? A. That is true.

Q. What compensation was he to get under that manager's contract? [342]

A. Under the manager's contract he received \$250 a month guarantee with 20 per cent of the net profit, over \$600, monthly base.

Q. Over \$600 monthly, net monthly base?

A. That is right. He got \$250 out of the first \$600, and run the business, paid the expenses on the first \$600 of business. If there is anything left out of the first \$600, he got it. Further than that, he got 20 per cent of the net profits.

Q. Was this \$250 paid out of that \$600?

A. That is correct. That was included.

Q. So, under that form of contract, he would get \$250 a month guarantee or \$3,000 a year and then anything over \$600 net profit?

A. No, sir.

Q. What? A. No, sir, I didn't say that.

Q. All right. You tell me.

A. He got his 20 per cent of the profit, net profit, of all business done over \$600.

Q. How long did this manager's contract have to run by its terms?

A. By its terms it could be canceled within thirty days by either party.

(Testimony of Glenn H. Fisher.)

Q. Subject to a 30-day cancellation? [343]

A. That is true. He was put on that basis just for the first two or three months, according to my more or less understanding with him.

Q. What do you mean your "more or less understanding with him"?

A. All right. He asked me about the franchise when he came up here, and that is when I told him that he should not go on the franchise; that he would make more money and would be better off to go on a managership franchise or a managership agreement, and I felt that if he would go in and do his work and finish all the work which was laid out here that he would then be in a very fine position to go on the franchise agreement on July 1st.

Q. Where did you discuss the matter with him after he came to Portland?

A. You mean on the first trip here?

Q. Yes.

A. In the hotel room, I believe it was, or at Mr. Taylor's home where our office was at that time. I would not be sure.

Q. I mean with reference to this franchise contract.

A. I didn't discuss it at that time. We had made our discussion on that score before he left Oakland. I merely had the contract with me and he seemed to be very familiar with it. He didn't hesitate to sign it. He said, "Where is your pen?"

Q. Did you bring it to Portland? [344]

A. I brought the contract to Portland with me.

(Testimony of Glenn H. Fisher.)

Q. For his signature?

A. For his signature.

Q. For what other reason did you come to Portland?

A. To terminate our agreement with Mr. Taylor, our former manager.

Q. When did you terminate your agreement with Mr. Taylor?

A. Let's see. I imagine—I think it was the 4th or 5th of April, the first week of April.

Q. That is when you had Mr. Brewer sign the manager's agreement?

A. That is true.

Q. What did you do towards having it changed over to a franchise agreement as of July 1st?

A. I had nothing to do with it other than our discussion with Mr. Sibert in that regard in our Oakland office.

Q. Mr. Sibert was the man who told you to prepare the franchise agreement?

A. No, he didn't tell me to prepare that agreement at all.

Q. You had nothing to do with Mr. Brewer signing that franchise agreement?

A. No, sir, other than sending it up there after the boundary or territory part of it had been filled in.

Q. When you sent it up, was it signed?

A. When I sent the two copies to Mr. Brewer?

Q. Yes.

A. Yes, I signed the two of them.

(Testimony of Glenn H. Fisher.)

Q. You signed the two of them and sent them up? A. Yes.

Q. You were not, of course, present when he signed it? A. No.

Q. Who delivered it to Mr. Brewer for signature? A. I mailed it to him.

Q. For signature? A. That is true.

Q. Do you know if anybody discussed it with him prior to July 1st?

A. Prior to July 1st? Yes, I think Mr. Sibert had. I don't know. He probably did.

Q. Isn't it a fact Mr. Sibert made the contract up in Portland here?

A. With the exception of the boundaries, and for that reason Mr. Sibert would not sign a contract here without first consulting me on the boundary situation. Mr. Brewer, as I recall the conversation with Mr. Sibert, had requested a portion of the State of Washington to be included into the franchise because of the proximity, particularly of Vancouver across the river, and we would not write that in the franchise. Mr. Brewer, if I am not mistaken, was left a copy of this exact franchise as it was typed here under Mr. Sibert's orders, and two of them [346] were brought to Oakland, that is, the two that were used to fill in the boundary, to have the boundaries of the territory put in, and that was typed in Oakland and I signed them, inasmuch as I had more or less promised or intimated to Mr. Brewer that his franchise would start July 1st, and mailed them to him.

(Testimony of Glenn H. Fisher.)

Q. When was this concern incorporated?

A. July 1st, 1946.

Mr. Bernard: That is all.

Mr. Rankin: That is all.

(Witness excused.)

Mr. Rankin: That is our case in chief, if your Honor please.

Plaintiff rests.

STIPULATION

Mr. Bernard: If your Honor please, before I proceed with the testimony, Mr. Smith has kindly agreed to stipulate with me that the original complaint filed in the Circuit Court of the State of Oregon for the County of Multnomah, Paramount Pest Control Service, a corporation, vs. Charles P. Brewer, Raymond Rightmire, Carl Duncan, Earl Merriott and Rosalie Brewer, which, as we have said, involves the same matters involved here and which was verified by Mr. T. C. Sibert, contains the following allegations with reference to this franchise contract:

“That notwithstanding the written provision 27 of said agreement, the parties did not, and do not intend that the laws of the State of California shall govern any or all questions that may arise concerning the validity, construction or interpretation of this agreement, nor did they intend that any civil action which might be filed had to be filed in the State of California.”

Mr. Smith: That is correct, your Honor.

Defendants' Testimony

RAYMOND RIGHTMIRE

one of the defendants herein, being first duly sworn,
was examined and testified as follows:

Direct Examination

By Mr. Bernard:

Q. Mr. Rightmire, where do you live?

A. In Portland, Oregon.

Q. How long have you lived here?

A. Since August, 1946.

Q. Where did you live prior to coming here in August, 1946?

A. I lived in Vancouver, Washington, two years.

Q. When did you first go into the pest control business?

A. It was in May, 1946.

Q. May, 1946?

A. Yes. [348]

Q. And where was that?

A. It was in Portland, for the Paramount Pest Control Service.

Q. Was it at that time that you signed this statement about not—Wait until I find it—this statement appearing on page 8 of the complaint starting out "Because I do have a limited knowledge of the exterminating, pest control, or termite business, and do not know any formulas, processes, methods, or other trade secrets thereof, I agree," and so forth? Was it at that time that you signed that statement?

A. Yes, near that time.

Q. About in May?

A. Yes.

(Testimony of Raymond Rightmire.)

Q. Did you at that time have any knowledge of the exterminating business or pest control business?

A. Very little.

Q. Who hired you?

A. Mr. Sibert of the Paramount Pest Control Service and Mr. Brewer.

Q. After you were hired, what did you do?

A. Oh, I immediately began traveling around with Mr. Duncan for about three days.

Q. What information did Mr. Duncan give you?

A. Well, he showed me how to cut up carrots and apples and things like that and put them in a one-gallon can and stir it up and put a little chemical on it or poison, and we ran [349] around these buildings, around the baseboards, and dropped little pieces here and there; and he showed me a little bit about roaches, how to exterminate them, or about how it was done.

Q. What did he show you about exterminating roaches?

A. He had a little bit of a puffer that laid in the palm of his hand, with a little powder in it, and he went around the cracks where roaches might be, showed me where they might be in there—that was the principal thing that Mr. Duncan showed me.

Q. You say you worked with him for about three days?

A. That is right.

Q. At any time were any formulas, processes or methods or trade secrets given to you?

A. No, not that I know of.

(Testimony of Raymond Rightmire.)

Q. After these days what did you do, Mr. Rightmire? A. I went to work by myself.

Q. Did you continue to work by yourself from that time on? A. Yes.

Q. Just tell the Court how you would work. In other words, would you be given the names of persons to go and call on, or what?

A. There was a list of customers around there in the office in the Kardex form, and principally those at first was trouble calls, continuous trouble calls. The phone was ringing whenever [350] I was in the office, and when I was out I called in to the office and it was always troubles. Two-thirds of my time, after the first days, were spent on troubles.

Q. Then, after that period, how did you work?

A. Well, after that period of time, the salesman that was with the organization at that time was contacting people, and I was working behind him. I did have to learn about exterminating these pests myself. Something that no one seemed to be able to show me in the Paramount organization was how to exterminate them. They were servicing these customers, and they didn't show me how to get rid of them.

Q. You say you learned that yourself?

A. Yes.

Q. How long did you continue to work for them, Mr. Rightmire?

A. Beginning or near the first of July I was told by Mr. Hilts and I was told by Mr. Brewer

(Testimony of Raymond Rightmire.)

that I was no longer at that time working for Paramount Pest Control Service, a partnership; that I was working for Charles P. Brewer, and I felt, due to the fact of this little slip that I signed, that I was no longer obligated to them, since I was not working for them, for that partnership.

Q. Mr. Hilts told you that?

A. Mr. Hilts and Mr. Brewer.

Q. After July 1st, how did you continue?

A. Well, we were continually making an effort and endeavoring [351] to exterminate pests in order to hold these accounts, and we did settle this cancellation business within three months or four. I recall in that time very long hours of hard work and uncertainty, because I didn't know all about it.

It was during that time, it seems to me, about three months after that Mr. Sibert came—I believe he flew up here—and as I came to work that morning Mr. Brewer drove up with his car, with Mr. Sibert in the car, as I was walking up Park Avenue to our office.

Mr. Sibert stepped out of his car in the presence of Mr. Brewer and myself and he said, "Ray, you fellows have done a wonderful job here," and he said, "You have brought this thing out of the red for the first time, the first time that the Portland territory was ever out of the red."

I thanked him and told him that I thought we had done all right, due to the fact that our knowledge was limited and that our education had been

(Testimony of Raymond Rightmire.)

slightly neglected along those lines, and he turned to Mr. Brewer and said, "Charlie, remind me to send this boy a course in chemistry right away," but I never got that course in chemistry.

Q. Can you figure about what month that was, Mr. Rightmire?

A. It must have been in July, June or July. Dates didn't mean much to me. I don't keep a diary.

Q. Did you go on vacation in July?

A. That was in 1946, that other statement. Yes, I did. [352]

Q. How long did you continue that work, through 1946 and 1947?

A. I am going to make a correction here.

Q. Yes.

A. I didn't go on vacation in July, 1946.

Q. What work did you continue to do throughout 1946, say, for the first half of 1946?

A. It was mostly in extermination of rats, mice and roaches. There was an occasional ant job. I think during my employment by Paramount that there was not over eight or ten jobs of ant control or ant extermination.

Q. How would you do those jobs?

A. Well, we had some ant cups, they call them, and we put those around, but they didn't do any good. In fact, it looked to me as if the ants was getting fat on them, so we tried other things, and eventually that roach powder and everything else

(Testimony of Raymond Rightmire.)

that satisfied the customer, but to this date I am not a good ant exterminator.

Q. Did you go on vacation in July, 1947?

A. Yes.

Q. When did you go?

A. Went to Camp Sherman.

Q. When?

A. It was the very last part of July.

Q. You went to Camp Sherman? [353]

A. Yes.

Q. How long were you down there?

A. I think we were up there three or four months.

Q. Prior to your leaving, Mr. Rightmire, did you know that Mr. Brewer had severed or intended to sever his connection with Paramount Pest Control Service? A. I did not.

Q. When did you first receive any information that Mr. Brewer had severed or intended to sever his connection with Paramount Pest Control Service?

A. When I asked Mr. Brewer for this vacation, which was much overdue, he told me he would let me have the vacation, that he thought it was earned, that I was entitled to it, and then he didn't know at that time whether he would still be manager of Paramount when I returned.

Q. Did he make any further statement about that? A. Not that I remember of.

Q. You returned when?

A. Three or four days later: the exact dates I don't recall.

(Testimony of Raymond Rightmire.)

Q. Do you remember being over at Mr. and Mrs. Brewer's house about July 30th when Wendy Fisher came over there?

A. I went over there and returned Mr. Brewer's fishing equipment. I had borrowed it to go fishing on my vacation. I was visiting with Mrs. Brewer, as Mr. Fisher said.

Q. Had you been informed then Mr. Brewer was severing his [354] connection with the company?

A. I had not been completely informed then.

Q. You had not been completely informed? What information did you have?

A. I knew by his statement before I went that he was going to break with them, but I hadn't got to talk to Charlie myself right at that time.

Q. That was about the time you went on your vacation?

A. About the time I went on my vacation, yes.

Q. What was the conversation, as you recall it, over in the Brewer home on July 30th when you returned this fishing equipment to Mr. Brewer here?

A. Mr. Fisher was in there. I and Mrs. Brewer was visiting there, and he came in and, I don't know—we were all in a very jolly mood. I was happy over having a vacation. I didn't make any statement; neither was there a statement made there concerning the fact that I had my vacation pay and if I hadn't got it I never would have got it. That statement was never made, nor there was no statement made there of that kind that I recall at all.

(Testimony of Raymond Rightmire.)

Q. What is your recollection of the conversation with Mr. Fisher?

A. I don't remember much of it. It was very short. I returned Charlie's equipment. I really don't recall right off.

Q. When did you receive any definite information that Mr. Brewer had resigned or had severed his connection, we will say, with [355] Paramount Pest Control Service?

A. After we left the house—I left the house and Mr. Brewer followed me to his car and told me that he was done with Paramount.

Q. That was on July 30th?

A. I think so, yes.

Q. Did you see Mr. Hilts within a day or two of that time?

A. Yes, Mr. Hilts called at my home.

Q. Do you remember what date?

A. I think it was the 31st. I am not sure of that.

Q. What was the conversation between you and Mr. Hilts at that time?

A. Mr. Hilts came to my home. It was a nice day and we sat out on the steps. He told me he regretted that I had been sick and called mainly for that purpose, that I had been sick and he was there to console me.

I remember very distinctly that I told Mr. Hilts right there that I would not believe, under any consideration, anything that Mr. Sibert would have to say to me, although I assure you there was no profanity used in our conversation.

(Testimony of Raymond Rightmire.)

Q. What else did you talk about?

A. Well, that immediately led to a conversation of Mr. Merriott.

Q. What was that?

A. Mr. Merriott, an employee.

Q. What was said about Mr. Merriott? [356]

A. He asked me if Mr. Merriott was a good exterminator. I told him he was a good exterminator. He said, "We might want to use him for a while."

Q. Anything further said that you recall?

A. He soon drifted to the subject of personal affairs and we sat down and visited cordially of what we had done in the past.

Q. When did you go to work for Brewer's Pest Control?

A. Shortly after the 1st of August, 1947.

Q. Tell the Court how you happened to go to work for Brewer's Pest Control? Who approached you?

A. Mr. Brewer approached me on that.

Q. What did he have to say?

A. He asked me if I would care to work for him in the pest control business. Knowing Mr. Brewer, knowing he had dealt fair with me and everybody else that I ever saw him deal with, knowing he was honest and had given me a fair deal, and not then having a job or any way to make a living for my family, I accepted the offer.

Q. By the way, how do you mean work? What sort of an arrangement did you have as to compensation?

A. He pays us each week.

(Testimony of Raymond Rightmire.)

Q. Is that the way you were paid prior to the organization of Brewer's Pest Control?

A. Yes, we were paid weekly.

Q. You were getting a weekly wage? [357]

A. That is right.

Q. Mr. Rightmire, did you have any understanding, directly or indirectly, with Mr. Brewer, or with any other person, that you would quit the Paramount Pest Control Service and attempt to take over their business? A. No.

Q. Was that matter discussed between you and Mr. Brewer at all?

A. It was not discussed at all.

Q. But did you discuss it with any other person?

A. No other person.

Q. Is your only interest in this thing as a wage earner?

A. That is right. I am just a working man.

Q. What kind of work have you done for Brewer's Pest Control?

A. Exterminating work.

Q. Did you have any list of the customers of Paramount Pest Control Service?

A. I did not.

Q. Have you done work for persons who were former customers of theirs? A. Yes, sir.

Q. Have you secured other accounts as well?

A. Yes, sir.

Q. What part of the state do you work in?

A. Well, I was—I did work for Mr. Brewer in the Eastern [358] Oregon territory last but since

(Testimony of Raymond Rightmire.)

the 1st of November, I believe, I have worked more in the west and southern parts of the state.

Q. Have you done work for Brewer's Pest Control for the Sugar Bowl in The Dalles?

A. Not for Brewer's Pest Control, no.

Q. Or for the Peasley Transfer or Transportation Company in Boise, Idaho?

A. I have not.

Q. Or for The Dalles Hotel?

A. I have not for The Dalles Hotel. Explanation there—The Dalles Coffee Shop which has an owner by itself, I worked for them.

Q. You have worked for the coffee shop in The Dalles Hotel? A. Yes.

Q. There is some evidence here that somebody told somebody else that somebody representing Brewer's Pest Control had told them that Paramount was dissolving, that Brewer was really a change of name from the Paramount Pest Control Service. Did you ever make any statement anywhere like that to anybody connected with The Dalles Hotel or The Dalles Coffee Shop?

A. Absolutely not.

Q. Did you make any statement of that kind to any person at any time? A. No.

Q. Have you at any time in your work for Brewer's Pest Control [359] made any statement at all regarding the Paramount Pest Control Service?

A. I have not.

(Testimony of Raymond Rightmire.)

Q. Are you now in possession of any formulas, trade secrets or processes of any kind furnished to you by Paramount Pest Control Service?

A. No, I have none in my possession at all.

Q. Did they ever furnish you with any?

A. No.

Mr. Bernard: You may cross-examine.

Cross-Examination

By Mr. Rankin:

Q. Mr. Rightmire, you said the matter of your instruction when you first went to work for Paramount Pest Control Service was very meager?

A. Very simple, yes.

Q. In other words, it was very poor instruction?

A. No, sir; it was just of very short duration.

Q. What was the character of that instruction that you did receive?

A. As far as the instruction I had, it was good.

Q. When did you go to work for them?

A. In May, 1946.

Q. As I gathered the import of your testimony a moment ago it was that you had not had very much instruction, that they [360] just showed you a few places where you might put down something that some pest or rodent might eat?

A. Yes, that was in the instructions.

Q. Will you tell the Court whether the instruction you received when you began in May, 1946, was good or bad?

A. What instruction I had was good.

(Testimony of Raymond Rightmire.)

Q. Who was in charge at that time?

A. The instructor, you mean?

Q. Yes. A. Mr. Duncan.

Q. Mr. Duncan? A. Yes.

Q. And he is now associated with you in the Brewer's Pest Control, is he not?

A. He is an employee of Mr. Brewer.

Q. You are associated with him in that same business, are you not?

A. I am an employee of Mr. Brewer.

Q. Will you answer the question?

(Question read.)

A. Yes.

Q. You were also a defendant in the case that was brought by Paramount Pest Control Service in August of 1947, were you not? A. Yes.

Q. And you were served with a copy of the complaint in that [361] case? A. Yes.

Q. And that charged you, did it not, with violating your agreement that you would not go into the business for a period of three years after your employment ceased? A. Yes.

Q. And you went right in business with Mr. Brewer even after you had been served with that complaint, did you not?

A. I am an employee of Mr. Brewer's.

Q. Answer the question, please.

A. I am not in business with Mr. Brewer.

Q. You went on in the pest control business, irrespective of the fact that you were served with a copy of the complaint, didn't you? A. Yes.

(Testimony of Raymond Rightmire.)

Q. You knew at the time you were going in the pest control business that you were serving the same accounts in behalf of Mr. Brewer that you had previously served in behalf of Paramount Pest Control Service? A. Some of them.

Q. Some of them? A. Yes.

Q. What percentage? A. I wouldn't know.

Q. You have a very good idea, haven't you?

A. I am not a bookkeeper.

Q. I didn't ask you that. I said you had a pretty good idea?

A. I have no idea of the percentage.

Q. Many or very few?

A. I don't understand that question exactly.

Q. Well, let's go back to the beginning. You served customers who wanted their services, services of the Paramount Pest Control Service, in connection with pests, did you not?

A. For Paramount?

Q. Yes, Paramount Pest Control Service?

A. Yes.

Q. You knew that they were under contract with Paramount Pest Control Service, did you not?

A. Yes.

Q. And you made reports upon this service to the Paramount Pest Control Service?

A. Yes.

Q. Whenever you serviced an account, you wrote out a slip saying that you had serviced it on such and such a date, for such and such a pest, did you not? A. Yes.

(Testimony of Raymond Rightmire.)

Q. Did Mr. Brewer tell you anything?

A. Yes.

Q. What did he tell you?

A. He told me he was in business for himself.

Q. Did you make no inquiry about his contract or his franchise?

A. I didn't have any reason to.

Q. That is not answering my question. Did you?

A. I didn't make any inquiry.

Q. You did not? A. No.

Q. You were willing to just accept the situation, and go on, without finding out how Mr. Brewer had any right to go on with this pest control business, when you were advised by the complaint that was filed that he was violating his franchise, is that correct?

A. I don't understand the question.

Q. What do you want? Time to think?

Mr. Bernard: I object to that.

The Court: Go ahead.

(Question read.)

A. Yes. [366]

Q. (By Mr. Rankin): You only took a few days out of July, 1947, for a vacation, didn't you?

A. That is right.

Q. What date did you leave Portland?

A. I don't remember dates, exactly.

(Testimony of Raymond Rightmire.)

Q. The first part or the last part?

A. The latter part of July, though, sir.

Q. For your vacation? A. Yes.

Q. What business were you working in before you left? A. Before I left for a vacation?

Q. Yes.

A. I was working for Paramount Pest Control Service.

Q. And where were you working for Paramount Pest Control Service?

A. I had been working in the Eastern Oregon territory

Q. When did you leave Portland to work on the Paramount Pest Control Service in Eastern Oregon? A. Some time the first part of July.

Q. And where did you go?

A. Went to Eastern Oregon.

Q. Whereabouts in Eastern Oregon?

A. That *would* The Dalles, Hood River, Pendleton——

Q. Where did you go after you left there, do you remember?

A. I imagine it was Hood River, up that way.

Q. Then where did you go?

A. From Hood River to The Dalles, Pendleton, Heppner, Hermiston, LaGrande, Baker, Union—around that territory as the main highway runs.

Q. Did you go to Boise? A. Yes, sir.

Q. The record here shows that a cancellation came in to Paramount Pest Control Service from concerns on your route very shortly after your visit to that section. Can you account for that fact?

A. I could, in one way.

(Testimony of Raymond Rightmire.)

Q. All right; any way that is the truth.

A. They sent their man into that territory and he told patrons of Paramount Pest Control that I was not only completely out of pest control but that I was in jail and that I was in court, and those people out there knew me personally, Mr. Rankin, and they knew I was not in jail.

Q. They saw you, didn't they?

A. They saw me after the man had told them that. That is why they lost customers out there.

Q. What man told you that?

A. The territory generally, in every town that was told to me.

Q. Can you name an instance?

A. At the Dairy Co-Operative Association in Hood River.

Q. Who was the Paramount man that they said told them that [368] you were in jail?

A. Mr. Elfers, if I remember right.

Q. Mr. Elfers? A. Yes.

Q. When did he see the accounts that you saw?

A. That I wouldn't know.

Q. This record will show that in some instances there were accounts that you called on, and they wanted to know whether you were still with Paramount. Would you think that Mr. Elfers was the one who had breached any business ethics if they laid the cancellations onto you?

A. It was through his contact——

Q. What if a customer says that you made the statement that they were not competent to carry on this business?

(Testimony of Raymond Rightmire.)

A. I would like to have you get one of those customers in here.

Q. I suppose you would. It is a safe thing to say. They did not believe you were in jail when they saw you there?

A. No, but they formed an awfully bad opinion of the man that had claimed that I was.

Q. I should think they would, if he made that statement. You went on as far as Boise and you also went to Bend, did you not? A. Yes.

Q. You wish to tell this Court that you didn't know all the [369] time you were making this trip that Mr. Brewer was going in for himself?

A. I don't wish to tell the Court that.

Q. What do you wish to tell the Court about your knowledge of whether, when you were serving on this trip, you were going to continue to serve Paramount Pest Control customers?

A. Is that a question? I didn't understand.

(Question read.)

A. I was serving the customers of Brewer's Pest Control then. They had agreed to and wanted my services.

Q. Did you solicit them?

A. Lots of them, yes. I solicited all potential business in every town.

Mr. Rankin: That is all.

Mr. Bernard: That is all.

(Witness excused.) [370]

EARL MERRIOTT

was thereupon produced as a witness on behalf of defendants and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Bernard:

Q. Mr. Merriott, where do you live, sir?

A. 706 Southeast Fourteenth Avenue, Portland, Oregon.

Q. How long have you lived in Portland?

A. Oh, about twenty-four years.

Q. When did you go into the pest control business?

A. I went in in the first part of February, 1947.

Q. Had you ever been in that business before?

A. No.

Q. When you entered their employ, what did you do?

A. I spent about three or four days with Ray Rightmire, who was showing me more or less of the groundwork on pest control.

Q. You went around with Mr. Ray Rightmire. What did Rightmire show you?

A. Oh, more or less putting out bait for rats.

Q. How did he tell you to do it?

A. We used vegetables, fish and meat, whatever was called for, and mixed it up in a gallon can or container and he showed me the use of the poisons, or the amount to put in, and we placed it out at what he was telling me was safe places in restaurants or wherever the place was we was servicing.

(Testimony of Earl Merriott.)

Q. How long did you work with Ray?

A. About four days.

Q. Were you at any time furnished with any formulas or trade secrets or things of that kind?

A. No, sir.

Q. After working four days and watching Rightmire do that work, what did you do then?

A. I went strictly on my own. I would be at the office at 8:00 o'clock in the morning and either Mr. Brewer or Mr. Rightmire would line me out on my stops for the day, which I made.

Q. How long did you continue to work in that fashion?

A. I worked until the last part of July, about the 30th or 31st.

Q. When, if at all, was the first time you knew Mr. Brewer had severed or intended to sever his connection with Paramount Pest Control Service?

A. I don't remember the exact date, but it was on a Saturday around a little after noon. Mr. Hilts and Mr. Brewer and—I don't remember exactly if Mr. Duncan was there at that time or not—but it was out at Mr. Brewer's home and Charlie told me that he was through, that I would be no longer working in his employment.

Q. You say that was the last of July?

A. Yes.

Q. On a Saturday afternoon? [372]

A. Yes.

Q. Mr. Hilts was there?

A. Yes.

(Testimony of Earl Merriott.)

Q. Did you have any information at all, either directly or indirectly, from Mr. Brewer on that subject prior to that time? A. No, sir.

Q. Had he ever talked to you about forming his own company and you going to work for him?

A. No, he hadn't.

Q. There is testimony at some place in this case that one of these Paramount Pest Control Service men, about that time, asked you if you were going to work for Paramount. A. Mr. Hilts.

Q. Was it at that time?

A. It was at that time.

Q. That was the first information you had?

A. That is right.

Q. What did you tell him?

A. I didn't tell him anything. He told me. He says, "You know that Brewer is breaking from Paramount?" And I said, "I had heard something but I didn't know what it was all about," and he wanted to know if I would continue to work for Paramount and I said, "Well, if Brewer is out, I want to make a living and I do like pest control and I will work for you."

Q. Why didn't you go to work for them? [373]

A. Well, at that time, that particular time, I was having car trouble and was working on my car at Brewer's home.

At that time I was working on my car. My car had broke down and I was working on it at Brewer's home, and I finished the job, oh, late in the afternoon. As Mr. Rightmire had been more or less on

(Testimony of Earl Merriott.)

the sick list, I dropped out to see him, and that is when I heard that he was through with them, that they had offered him some agreement, better than his position was in the past, and he had turned it down. Well, I was more or less curious to find out why.

The only thing he would tell me, he said, "Well, they want you to work for a while, but only for a while," and that I probably would not last very long. That statement was made to him by Mr. Hilts.

Mr. Rankin: How do you know?

Q. (By Mr. Bernard): Mr. Rightmire claimed that statement was made by Mr. Hilts?

A. Mr. Rightmire told me that statement was made by Mr. Hilts.

Q. When did you go to work for Brewer?

A. Oh, I believe it was the following Monday.

Q. When did Mr. Brewer contact you about going to work for him?

A. He didn't. I went over to talk to him, to find out.

Q. You went over there?

A. To find out what the score was and what he was going to do. [374]

Q. What?

A. I went over and talked to him, to see what he was going to do.

Q. What did he tell you?

A. He told me that he was going into business for himself, and asked me if I wanted to go to work for him and I said, "Yes."

(Testimony of Earl Merriott.)

Q. That was after this talk with Hilts?

A. With Hilts.

Q. Did you at any time enter into any agreement or understanding with Brewer or anybody else that Brewer was to quit Paramount Pest Control and that you boys would take over the business of the Paramount Pest Control Service? A. No, sir.

Q. What relationship did you have to the business? Did you have any interest in the business?

A. No, sir. I work for a weekly wage.

Q. What? A. I work for a weekly wage.

Mr. Bernard: I think that is all.

Cross-Examination

By Mr. Rankin:

Q. You said that you applied whatever poison there was for the pest. Did you know the kinds of pests? A. Yes. [375]

Q. Could you analyze what poison was best for them?

A. Not at that time, but Mr. Rightmire showed me.

Q. Did you know what ingredients were in the poisons that you used? A. No, sir.

Q. How did you know what poison was for what pest? A. Mr. Brewer told me.

Q. Mr. Brewer told you?

A. He supplied me with any poisons I needed.

Q. You were another one of the defendants in the case brought in the Circuit Court, weren't you?

A. Yes, sir.

(Testimony of Earl Merriott.)

Q. Did you ever know, before that case was brought, about Mr. Brewer's franchise?

A. No, sir.

Q. You knew it then? A. I heard of it.

Q. You saw it in your complaint, didn't you?

A. Yes.

Q. In that complaint in that case? A. Yes.

Q. You knew about Mr. Rightmire's agreement; you knew about Mr. Duncan's agreement from that, didn't you? A. Yes.

Q. Did that make any difference with you about going on and [376] serving with these men?

A. I was working for a living.

Q. It did not make any difference with you, then, did it? A. No.

Q. Did you also serve customers of Paramount Pest Control Service, whom you knew to be customers of Paramount Pest Control Service, before August 1st and Brewer's breach or leaving, the same customers that he served afterwards or that you served afterwards for Brewer?

A. Would you mind repeating that?

Q. Yes. Did you serve the same customers for Paramount that you later served for Brewer?

A. Some, yes.

Q. Did you solicit those customers?

A. I solicited any potential business.

Q. Including those that you knew were under previous contract with Paramount? A. Yes.

Mr. Rankin: That is all.

Mr. Bernard: That is all.

(Witness excused.) [377]

ROSALIE BREWER

one of the defendants herein, was thereupon produced as a witness and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Bernard:

Q. Mrs. Brewer, you are the wife of C. P. Brewer? A. I am.

Q. You were his wife before coming to Oregon?

A. Yes, I was.

Q. You and he moved to Oregon from California? A. Yes, we did.

Q. Will you tell the Court what work you did with reference to this pest control business for Mr. Brewer?

The Court: Do they have any children? Do these people have children?

Q. (By Mr. Bernard): Do you have any children? A. I have a daughter, yes.

Q. How old is she?

A. She is going on fourteen, in June.

Q. Go ahead.

A. I help my husband in the office, post things in the books. That only requires sometimes a couple of hours, or three days a week, sometimes not that much.

Q. I understand from Mr. Brewer just now that the daughter is a daughter of yours by a former marriage? [378] A. Yes, she is.

Q. How long have you and Mr. Brewer been married? A. Six years in April.

(Testimony of Rosalie Brewer.)

Q. Go on with your answer.

A. I posted things in the books for my husband because he couldn't. At first, when I worked at the office of Paramount was when my husband was manager and the Paramount Pest Control Service paid me \$35 a month for part-time work in posting things in the books, at that office, because they figured they could not afford to hire a full-time girl.

Q. That \$35 a month, was that paid to you out of Mr. Brewer's salary or paid by Paramount?

A. By Paramount Pest Control Service.

Q. That is when he was acting as manager?

A. That is right.

Q. Go ahead.

A. And after Mr. Brewer took the franchise, I continued to help him because he could not afford to hire a girl. I did not spend all my time at the office, because I also ran my home.

Q. Did you do just book work?

A. Yes, that is all. I am not a bookkeeper.

Q. Do you, yourself, have any personal knowledge as to the circumstances under which Mr. Brewer changed from a manager's contract to a franchise?

A. Yes. I was there when Mr. Sibert offered my husband a [379] franchise in our home.

Q. What was said at that time? That was in Portland?

A. This was in Portland.

Q. Go ahead.

A. It was in the breakfast room of our home. My husband called me from the living room and

(Testimony of Rosalie Brewer.)

told me what Mr. Sibert had told him and asked me, "What do you think, dear?" He said "It is our money, you know."

I said, "Well, we haven't much of a choice. We are here. We have our home here, and it is entirely up to you just what you do."

Q. Had you heard any of the talk prior to that time between Sibert and your husband?

A. Why, yes. Right after that Mr. Sibert told me that within a few years' time my husband would be giving me a thousand dollars a month to run my home, and I laughed and said, "I would not know what to do with a thousand dollars if he gave it to me."

Q. Was that before this franchise contract was signed?

A. Yes.

Q. After that time you continued to do this book work, did you?

A. I helped my husband whenever he needed it, yes.

Q. Do you have any personal knowledge of what took place in March when they had some dispute over whether it was to be [380] divided on a 50-50 basis or not?

A. The only knowledge I had was when my husband turned to me——

Q. Just a minute. Was anybody there at the time?

A. Mr. Hilts and my husband and I were in the office when Mr. Hilts asked for franchise money

(Testimony of Rosalie Brewer.)

and my husband turned to me and asked me to make out a check. I hesitated and got red in the face. He yelled at me, which he doesn't usually do, and told me to make it out.

Q. That was the check that was drawn in March? A. That is right.

Q. You say your husband yelled at you. What did he say?

A. My husband does not usually speak very harshly to me.

The Court: You are lucky. Hardly any other woman can say that.

A. Maybe not, but I can.

Mr. Bernard: Well, go ahead.

A. He told me to make out that check in a certain tone of voice that he does not usually use.

Q. What did he say to Mr. Hilts?

A. Nothing at that time, except that he handed him the check.

Q. Were you with him when he talked to him?

A. No, sir, I wasn't.

Q. There is in evidence here a copy of a letter dated March 15th from Hilts to your husband. You are familiar with that letter, are you? [381]

A. I signed for it.

Q. When did that letter come to your home?

A. On a Sunday morning.

Q. Was it a special delivery letter?

A. Yes.

Q. Sent by airmail? A. Yes.

(Testimony of Rosalie Brewer.)

Q. And you signed for it? A. Yes, I did.

Q. Did you go down to Oakland with your husband in the latter part of June?

A. No, I didn't. I was in California, visiting my sister.

Q. Did your husband meet you there?

A. Yes, he did.

Q. About what date?

A. Around the last part of June.

Q. Did you go to Oakland with your husband, then? A. Yes.

Q. When did you get in Oakland?

A. We came from Cupertino, California, Monday morning to Oakland to the Paramount office.

Q. Did you see Mr. Sibert?

A. Not at the office. Mr. Fisher took us to the home.

Q. Mr. Fisher took you to Mr. Sibert's home?

A. Yes. [382]

Q. Tell the Court about what the conversation was, generally, in Mr. Sibert's home?

A. Well, they were friendly when we came in. That afternoon he told me that I didn't need to work myself and I asked why. I didn't understand it. I said, "I don't understand what you mean at all," and he said, "Well, Charlie can afford to hire a girl now."

I said, "Well, I don't see where he can, where I have been doing that," and I said, "I don't see why he has to get a girl at \$150 a month when it just

(Testimony of Rosalie Brewer.)

takes me a short while to do that work, and I could use it myself," and he said, "Rosalie, Charles has made \$10,000 in this last year," and I said, "I haven't seen a cent of it."

Q. What happened then?

A. I felt very bad about it, enough so I was mad about it.

Q. You knew about what he was making?

A. Yes, I did.

Q. Where did you go then?

A. Well, we had dinner there and then, later on in the evening, I went upstairs and I cried.

Q. With reference to that time, when did you return to Portland?

A. We came back to Portland the following day.

Q. By plane? A. By plane. [383]

Q. Were you informed then by anybody that there was any proposed change?

A. My husband did start to discuss it with me on the plane but I got ill, and then we talked about it after we got home.

Q. Well, what did he tell you?

A. He told me they wanted him to go back on the 20-80.

Q. Who wanted him to go back on the 20-80 plan?

A. Mr. Sibert wanted him to go back.

Q. Did your husband seem agreeable to that?

A. No, sir.

Mr. Bernard: I think you may cross-examine.

(Testimony of Rosalie Brewer.)

Cross-Examination

By Mr. Rankin:

Q. Did you know about the 20-80 plan, Mrs. Brewer?

A. Yes. My husband and I had talked about it, yes.

Q. When did you first learn about the 20-80 plan?

A. When he first took the franchise?

Q. July 1, 1947? A. That is right.

Q. Did you know of the 20-80 plan before that?

A. No.

Q. Your husband had never discussed whether or not he wanted to go under the franchise?

A. No, sir.

Q. Did he tell you when he had signed the 20-80 franchise? [384] A. I beg your pardon.

Q. Did he tell you when he had signed the 20-80 franchise?

A. He told me when he signed it, yes. I mean he signed it, yes, but I don't know the exact date. I wasn't with him.

Q. Some time in July, 1947?

A. Some time in July, yes.

Q. He subscribes that there was a change made in that 20-80 franchise some time after it was signed. Do you know when that change was made?

A. My husband and I went to Oakland in November. He was telling me that he could not go any longer on that 20-80 basis, that we were not

(Testimony of Rosalie Brewer.)

making any money, and that we had used all of our savings to live on that we had, and that was the reason we went to Oakland in November.

Q. Had you then determined not to go on with the franchise if you could not get a modification of it?

A. I am sorry. I didn't have anything to do with that myself.

Q. Did your husband——

A. I didn't think so much about it. He only discussed it with me.

Q. Your husband discussed it with you, did you?

A. He did talk about it, yes.

Q. Did he tell you whether or not he was going on with the franchise if he could not get a modification?

A. He didn't say anything about that one way or the other. [385]

Q. One way or the other?

A. No, sir, not to me.

Q. Your November conference was very satisfactory, was it not?

A. Yes, they were very cordial. In fact, the only conversation that I heard about was in the Athletic Club when Mr. Fisher came in—we had not seen him yet—and he shook hands around and said, "Hello." Ted Sibert said, "Charlie has agreed," and told him about it, and all I remember is that Mr. Fisher said, "Well, we can do that with Charlie, but we couldn't with Ossie in Seattle."

(Testimony of Rosalie Brewer.)

Q. How long was the 50-50 agreement, as you described it, to last?

A. Well, what my husband told me, it was to last from then on.

Q. You did not hear any conversation with any of the Paramount people at all?

A. No, I didn't.

Q. Did anyone tell you any different, at any time subsequently? A. What do you mean?

Q. Did anyone from Paramount tell you anything different? A. No, not me, no.

Q. You have testified that you were red in the face, I believe. A. I was.

Mr. Rankin: May I see the exhibits, please, and particularly [386] the check, the February check?

Q. This check that I hand to you is dated February 6, 1947. Is that your signature attached to it? A. That is my signature?

Q. Yes; is that your signature attached to it?

A. That is my signature, yes.

Q. Were they asking you for money at the time you signed this check?

A. My husband asked me to make the check. That is all I know about it.

Q. You don't know whether they were asking you for money or not?

A. No, I don't. I wasn't at the office very often.

Q. How did you happen to select the \$250.

A. He told me to make it out for that amount and that is what I did. He ran the business. I didn't.

(Testimony of Rosalie Brewer.)

Q. Did you tell Mr. Hilts at that time you wished it were was more? A. I don't recall.

Q. Were relations friendly at the time *between* and Paramount Pest Control Service, at the time that check was drawn?

A. I believe so.

Q. As a matter of fact, they continued friendly down to the 24th of July, didn't they?

A. The 24th of July?

Q. Yes. [387]

A. Yes, we were always friendly.

Q. They weren't friendly after Mr. Brewer terminated his agreement?

A. No, they have not been.

Q. But you don't recall whether or not you advised Mr. Hilts that you were not pleased about this \$250? A. I don't remember, sir.

Q. Let me hand you this letter. Your name is Rosalie, is it not? A. Yes, it is.

Q. I hand you this and ask you if that is a copy of your letter? A. Yes, it is.

Mr. Rankin: We offer it in evidence.

Mr. Bernard: May I see it? No objection.

The Court: Admitted.

(Copy of letter dated 2/6/47 "From Rosalie to Harold" thereupon received in evidence and marked Plaintiff's Exhibit No. 81.)

Q. (By Mr. Rankin): This is the letter by which you sent the check? A. Is it?

Q. I am asking you.

(Testimony of Rosalie Brewer.)

A. I don't know whether it is or not. If it is dated the same date the check is dated—— [388]

Q. The letter reads as follows—It is dated February 6, 1947.

A. Was that the date the check was dated?

Q. That is right.

A. Then it accompanied.

Q. It reads: "From Rosalie; to Harold." Who is Harold? A. Harold Hilts.

Q. "Am sending \$250 on the franchise. Best I can do today. There will be more when we can spare it without putting ourselves in a hole. I wish it was more but no can do.

"Charlie is in Salem. Boy, John sure is giving us the works. Most every account we have in that territory has been neglected for months and are the cancellations coming in fast and furiously. John is telling all the customers which he has kept happy some that we are going bankrupt and he is taking over that territory. Charles and Ray are both in there today and fighting it. It's like starting all over again."

You sent that letter? A. Yes, I did.

Mr. Rankin: That is all.

Redirect Examination

By Mr. Bernard:

Q. Who is this "John" that is mentioned as "giving us the works"?

A. It is a former Paramount employee that was here before [389] my husband came up here.

(Testimony of Rosalie Brewer.)

Q. Do you know what he was mad about?

A. Yes, I do. He was promised the manager-ship of Oregon before my husband came here and didn't get it.

Q. And he was mad about that?

A. Yes, he was.

Q. He was out there in the territory taking business away from Paramount? A. He was.

Mr. Bernard: I think that is all.

Mr. Rankin: That is all.

(Witness excused.) [390]

CHARLES P. BREWER

one of the defendants herein, having been previously duly sworn, was recalled and was examined and testified as follows:

Direct Examination

By Mr. Bernard:

Q. As far as possible, I want to avoid covering matters that you testified to previously and, unless the question calls for it, please do not cover the same ground.

It appears from the testimony of Mr. Conger that you started ordering cards and blanks and things of that kind about July 7th. Was that before or after you had been informed that Paramount Pest Control Service desired to go back on the 20-80 basis as of the 1st of July?

A. That was afterwards.

(Testimony of Charles P. Brewer.)

Q. Why did you start ordering these articles at that time?

A. Well, I had already told Mr. Sibert that I was going to break, but, in my exact words, I would carry the business through the month of July, and that is all, and I figured that at any time he might break in here with ten or twelve men and start to grab, and, if he did, I was going to have some printing handy. On July 9th, when Harold was up here to audit the books, he pulled the first audit or balance sheet, as you might call it, showing me somewhere around \$3,900 owing Paramount.

The Court: That has all been covered. [391]

Mr. Bernard: I don't care about that.

Q. Have you got in the courtroom here an empty can containing this 1080 that you purchased from the U. S. Fish and Wild Life?

A. I have.

Q. Is this the can in this bag?

A. That is one of them.

Q. In what shape did the can come to you that you purchased from Paramount Pest Control Service?

A. Well, they were the same sized cans, identical with that, except that they had the Paramount labels.

Q. What did the Paramount label look like?

A. That is a long label. In the exhibits I believe they have somewhere around three of them in there. They are red, more of a red label.

(Testimony of Charles P. Brewer.)

Q. I notice that this label is scratched a little bit. How did that happen? A. I did that.

Q. When?

A. When I emptied the can. The can is quite empty with the exception of a little bit of residue that has not been washed out thoroughly. Any time I empty one of these cans, I invariably scratch the label to tear it apart and try to get it off of there, and then get rid of it so it cannot contaminate anything and nobody can pick it up and come in contact with any of the poison. [392]

Q. Was there a Paramount label ever on this can? A. No, there never was one.

Q. Mr. Hilts has testified about the amount of money that was in the bank in Portland, the bank account in Portland. Who opened that bank account?

A. I opened that bank account with money from my savings. I opened it up in the First National Bank and shortly thereafter they notified me that Paramount had an assumed name certificate filed, the partnership here in Oregon, and I couldn't have a bank account there unless I filed an assumed name and Mr. Sibert was here right—Oh, it was shortly thereafter. I don't know. I guess it was around the first of May, but I did let the bank account ride, and I went up to the courthouse and got a withdrawal slip and gave it to Mr. Sibert and asked if he would fill it out so I could file an assumed name and have the bank account. He said he would let

(Testimony of Charles P. Brewer.)

me know. I got a letter back that may be along that line. He said that their attorneys said that they still had an interest in this business up here and they would not release the assumed name certificate, so I went down to the bank and talked to them——

Q. I don't care to go into all these details. When you finally opened up the bank account, who could sign checks on it?

A. My wife, I know for sure—I gave her authority at the [393] bank—and myself and no one else.

Q. Was anybody present when you closed that bank account?

A. Mr. Hilts was with me when that bank account was closed on August 2, 1947. I closed the account and Mr. Hilts turned to the man, the minute I said I wanted the account closed, and said, "I want to open an account."

Q. Mr. Wendy Fisher has testified that along about July 30th he had a conversation with you and Mrs. Brewer. He further said that you went to the Roosevelt Hotel and, after dinner, went up to his room and he quotes you as saying that you were quitting and taking all the Paramount employees with you; that they had been collecting all the money they could and if there was a dollar left Paramount could be lucky; and that Paramount would be in no position to take care of their accounts for some months to come.

(Testimony of Charles P. Brewer.)

Will you tell the Court what your recollection is of the conversation in Mr. Wendy Fisher's room that night at the hotel?

A. Why, yes, we had gone out to dinner, and we came back up. We were friendly. We always have been. He had come back down through Washington and when I found out from him that he had not been near California, nor heard from them for a week or so, then I told him that he did not know the news.

I told him I was breaking with Paramount and he said, "What for?" And I told him. [394]

I told him of the different things that had come up, that I was not getting along, and I just gave him a resume of my relations with Paramount and he told me, "Well, Charles, you have just got to protect yourself, that is all there is to it," and—Well, I will leave that out.

I didn't tell him, though, that I was taking all the employees with me. I don't remember saying anything about the bank account because there was no bank account here of Paramount's. It was mine.

Q. Mr. Brooks testified that he was here around August 2nd, went out to your house. Do you recall Mr. Brooks being there?

A. Oh, yes, he came out. Mr. Duncan was staying with us at the time. He was getting ready to go on his vacation.

When I had taken my little girl to California, we had met Mr. Sibert at the airport. Raymond

(Testimony of Charles P. Brewer.)

Rightmire and Carl Duncan had driven me and my daughter to the airport to take the plane, and while we were waiting for the plane to take off Carl Duncan asked Mr. Sibert to have Harold Hilts get his vacation check ready for him, that he wanted to go the first of August to Oklahoma on his summer vacation and that he *was* supposed to be entitled to two weeks' vacation. Mr. Sibert began to hem and haw a little bit and said he wasn't working for Paramount, he was working for me, and Carl Duncan said he wanted that time off from the 1st of August for his summer vacation.

Q. This night on August 2nd, when Brooks came out to your [395] house—That was August 2nd, 1947, he says—you told him you were not going into business.

A. I don't remember whether I told him I was or was not or even mentioned it.

Q. Did you have any idea of telling him after August 1st that you were not going into business? Did you have any idea?

A. I don't remember telling him I was not going into business. I do remember telling him I broke from them.

Q. As a matter of fact, you were in that business by that time, weren't you? A. Yes.

Q. Do I understand that this can is in a rather dangerous condition to handle?

A. It is. If everyone is willing, I or someone who is acquainted with it can take the can and dispose of it, but it must be washed out.

(Testimony of Charles P. Brewer.)

Mr. Bernard: I am not offering it in evidence unless counsel desires. It is here if anybody wants it.

Mr. Rankin: We do not want it.

Q. (By Mr. Bernard): Did anybody audit your books every month?

A. Mr. Hilts audited them most every month.

Q. I am turning to Exhibit 51 which they say consists of checks regarding which there is no supporting data, totaling \$925.99, charged to you. Have you examined this exhibit?

A. Yes, I have. [396]

Q. Were any of those items drawn by you personally, or for you personally?

A. They were drawn—Some of them were drawn for me for expenses and things like that; drawn to me, yes.

Q. They were drawn to you? A. Yes.

Q. Was any of the money expended by you otherwise than for business? A. No.

Q. I see these checks start a way back in September, 1946. At the time that Mr. Hilts would make his audit, would those checks appear?

A. Yes, had they come from the books.

Q. The books would show what items of expense those checks were for? A. They do.

Q. Did Mr. Hilts audit the books each month?

A. He did.

Q. Did he ever raise any question about those books when he would make his monthly audit?

(Testimony of Charles P. Brewer.)

A. If he did not understand one, he would ask me what it was and I would explain it to him what it was, and he accepted it.

Q. Was any attempt made to charge these checks to you personally until after this lawsuit was started? A. None whatsoever. [397]

Q. The books, you say, will show what these checks were for? A. They will.

Q. Mr. Glenn Fisher has testified that down in California, when you first talked with these people, that he furnished you a form of manager's contract and a form of the franchise, and you took them home and studied them for a couple of days and then brought them back. What is the fact as to that?

A. That was not so. I never met Glenn Fisher until after I had been on the job for Paramount and he had come up from Los Angeles to Oakland. I didn't meet him—Pardon me. I did meet him for a few minutes in the office one time just before I hired out, when he had just arrived from New York, I believe it was, and the next time I saw him was when I was working for the company.

Q. Regardless of when you met him, were you ever furnished these two forms of contract in California? A. I was not.

Q. Did you have them home or take them home in California? A. I did not.

Q. Will you examine Exhibit 36 which purports to be a sort of a settlement of accounts for twelve

(Testimony of Charles P. Brewer.)

months from July 1, 1946, to June 30, 1947, and will you examine that and state whether or not that accounting is correct or substantially correct.

A. I think that account is very wrong, and I sat down with Mr. Hilts and talked with him for quite a while about it. [398]

Q. What do you contend is wrong?

A. I contend that it was far too much money due Oakland. They have accounts receivable here; besides, they have half of the bank account here, money that lay in the bank, they have here, besides the accounts receivable.

Q. In other words, you, in that accounting here, are charged with the accounts receivable?

A. I am.

Q. And charged with a part of this bank account? A. Right.

Q. Do you know, in round figures in a general way, what you figure you owed them for the year ending June 30, 1947?

A. I owed them somewhere altogether—it is somewhere between \$2,500 and \$3,000.

Q. In other words, you figured you owed them that for the fiscal year ending June 30, 1947?

A. That is for the thirteen months.

The Court: Does he still owe them?

A. Minus \$1,200 that has been paid.

Mr. Bernard: I was going to get to that.

Q. In other words, you drew out how much for yourself?

(Testimony of Charles P. Brewer.)

A. Besides what I took in and put back, I drew \$2,200.

Q. You drew \$2,200. You still owe them between \$2,000 and \$2,500, which would have left you in the hole?

A. They got \$1,200 and I got \$2,200, and there is around \$3,600 [399] or more due and payable on the books when I left them, and it leaves somewhere around \$1,500 or \$1,600 that there is due off of the due and payables on the books.

Q. Did you attempt, when these books were turned over to you, to try to arrive at the amount that was either owing by Paramount or due to Paramount? A. I did.

Q. From your examination of the books, in the time they were turned over to you here a few days ago, you say you have attempted to arrive at how this account stands between the two of you?

A. I have.

Q. Did you make up a statement for that purpose? A. I did.

Q. Refreshing your recollection with that statement, do you figure at the present date you owe Paramount money or Paramount owes you money?

A. I would say Paramount owes me money.

Q. Would you explain to the Court, now, how you arrive at that conclusion, based on the books?

A. Well, the total business, as I have put it down here—I will concede there may be a mistake some place—is \$22,000—the total business for 1947, \$22,734. The total business in 1946 was \$12,321.70.

(Testimony of Charles P. Brewer.)

In 1946 against \$12,321.70 there is \$11,935.38 expenses, leaving a net profit of \$386.32, which was made out and put on my income tax as a net profit for that year.

That was taken to California and audited down there in 1947, as I have said. The total business in 1947, \$22,734.60; the total expenses for 1947, \$16,737.67 total business, minus \$308 depreciation, which is not the correct figure—I found out since that there is more—\$16,000. Wait a minute.

The total business in 1947 is \$22,734.60. The total expenses, including depreciation, is \$16,737.67, leaving a difference of \$5,996.93 net profit for 1947.

Q. Now, then, how did you arrive at the statement that Paramount was indebted to you?

A. I arrived at that by dividing half of the \$386.32 net profit in 1946, plus the net profit of 1947, which is \$5,996.93. Well, I divided each one of these figures and added the two halves together.

Q. I see.

A. And it shows an approximate amount due Charles P. Brewer of \$1,305.97. There is no place in these books that I can find that shows any accounts receivable at the end of July. The accounts receivable which I have figured out here to the best of my ability, figured around \$3,299 approximately.

Q. Accounts receivable?

A. Accounts receivable on the books when I turned the books over to them. [401]

(Testimony of Charles P. Brewer.)

Q. Has any accounting been made to you of that at all?

A. None to me. There has been an accounting pulled on the books, but I have never seen it.

Q. Who made that accounting?

A. That was made by Sawtell, Goldrainer & Company.

Q. What is the amount that the accounting that they compiled shows you owing?

A. The amount shows \$1,305.97 due me.

Mr. Bernard: You may cross-examine.

Cross-Examination

By Mr. Rankin:

Q. Where did you get these figures?

A. The books.

Q. You took them off yourself?

A. I took them off myself.

Q. You could have done that any time in regard to the accounting that Mr. Hilts made to you in June, could you not? You paid on it, didn't you?

A. Through errors in the books——

Q. Just answer my question. You paid on the accounting, didn't you?

A. I paid on the franchise.

Q. On the franchise? July 1, 1946?

A. I paid on the franchise, as modified. I never paid at any time prior to the modification. [402]

Q. If you made up this audit for yourself, why didn't you make it up early enough and submit us a copy so we could scrutinize it?

A. Because you had the books.

(Testimony of Charles P. Brewer.)

Q. How long did it take you?

A. I saw them three days beginning last Thursday or Friday.

Q. They were given to you immediately after the Court denied an inspection of this audit, weren't they?

A. They were given to me some time around last Thursday or Friday. I don't know the exact date.

Mr. Rankin: We won't argue about that. I think Mr. Bernard will admit they asked for them and they were received immediately after the Court denied an inspection of the audit.

Mr. Bernard: No question about that.

Q. (By Mr. Rankin): You mentioned Mr. Carl Duncan. Where is he?

A. To the best of my knowledge, Mr. Carl Duncan is some place around Bend, Oregon, at the present time.

Q. In your employ? A. He is.

Q. He has been at all times since August 1, 1947?

A. He has not. He has been in my employ since somewhere around August 18th to 20th.

Q. You pay him just like you pay these other men that are hired? A. I do.

Q. Where does he live? [403]

A. Well, that is a hard thing to say. He is traveling twenty-eight days out of the month.

Q. Does he ever come to Portland?

A. He does.

Q. When? A. At the end of the month.

(Testimony of Charles P. Brewer.)

Q. You knew we were looking for him?

A. Yes.

Q. You never advised us when he was in?

A. I never advised you when he was in, but I did tell you where you could contact him in Idaho.

Q. Did you also know we could not serve him in Idaho?

A. I did not. It is the U. S. Marshal—I thought he could serve there.

Q. In the payment of the June accounting, you paid down to \$3,100, didn't you?

A. I gave him that check for \$259.61 with the provision that if this accounting was right, I would pay the balance left.

Q. Why did you make that odd figure, \$259.61?

A. Because I hadn't had a chance yet to study this, and Mr. Hilts assured me himself that it was correct. I said, "I will pay the odd figure," somewhere around \$250, and he broke off the odd figures and took \$259.61.

Q. Did you ever advise them by letter that the accounting was not right? [404]

A. No, never.

Mr. Rankin: That is all.

(Testimony of Charles P. Brewer.)

Redirect Examination

By Mr. Bernard:

Q. May I ask you a couple of questions? You say Mr. Duncan went to work for you the 18th of August.

A. He had been going to go on his vacation and Paramount threw this first lawsuit in the Circuit Court and he was served with papers for that court hearing, and he was going to take in a wedding of one of his relatives down south and when that trial was finally thrown out of court, he could not get there in time for the wedding so he said he might as well stay here.

Q. Had you talked with him at any time prior to that time?

A. No. I told him to go on his vacation.

Q. In this compilation that you have prepared, on the first page you have the number "70." What are those numbers?

A. Those are the page numbers taken from the books.

Q. Then, on the second page I notice after certain items there will be "Expense, No. 70," and "Expense, No. 71." What do they refer to?

A. Those are items of expense listed in the ledger under No. 70 or No. 85, or whatever number it is here.

Mr. Bernard: I would like to offer that compilation in evidence. [405]

Mr. Rankin: We object to that, your Honor, on the ground and for the reason that very early in

(Testimony of Charles P. Brewer.)

these proceedings we asked for a statement from defendants as to these claims. Mr. Leo Smith took the deposition of Mr. Brewer in my absence and in that called for a statement of what these comprise. The answer in that deposition is "We can't make it until we get the books." Then they did not try to get the books, although they were offered them, and they were offered previously and they were offered subsequently, and then, when the motion was made and the Court denied an inspection of the audit, for the first time they accepted the books, and they just brought them back this morning.

Now, to come in at the last minute, when there is no opportunity for us to examine it thoroughly, I submit to your Honor is not proper. Fairness in the trial of a lawsuit would require, as we have done here, the compilation to be put in at the pre-trial and the other side given a little opportunity to check the fairness or accuracy or the integrity of a statement like that.

The Court: Objection sustained.

Mr. Bernard: That is all.

Mr. Rankin: That is all.

(Witness excused.)

Mr. Bernard: That is our case, your Honor.

Mr. Rankin: That is all.

The Court: The testimony is closed, is it?

Mr. Rankin: No rebuttal, your Honor.

The Court: When do you want to be heard?

Mr. Rankin: Whenever it suits the convenience of the Court:

The Court: It makes no difference to me. The record has never been cleaned up as to Duncan. He has not been served.

Mr. Rankin: No.

The Court: He should be dismissed out of the case, I submit.

Mr. Rankin: Yes.

The Court: Dismissed without prejudice.

Mr. Rankin: Yes, if you will.

The Court: Is there any objection to that?

Mr. Bernard: No.

Mr. Rankin: Just a moment, please, your Honor. We have tried our best to serve him. I think the evidence has shown that. I wonder if it would not be possible, since he has not put in an appearance, to have the case continued as to him.

The Court: You cannot break up a case that way.

Mr. Rankin: This is a conspiracy case and I thought possibly that might be done.

The Court: I don't think so.

Mr. Rankin: We will take a nonsuit as to him, without [407] prejudice.

The Court: So ordered. Leave it this way: He is dismissed out on my motion without prejudice. That does not commit you.

Mr. Rankin: Yes, your Honor.

(Thereupon the hearing in the above-entitled cause was continued until Saturday, January 24, 1948, at 10:00 o'clock a.m. for argument of counsel.) [408]

In the District Court of the United States
for the District of Oregon

Civil No. 3936

PARAMOUNT PEST CONTROL SERVICE, a
corporation,

Plaintiff,

vs.

CHARLES P. BREWER, individually and doing
business as Brewer's Pest Control; ROSALIE
BREWER, his wife; RAYMOND RIGHT-
MIRE, CARL DUNCAN, EARL MERRIOTT,
and all other persons associated with said de-
fendants as herein described,

Defendants.

REPORTER'S CERTIFICATE

I, Ira G. Holcomb, a Court reporter of the above
entitled Court, duly appointed and qualified, do
hereby certify that on the 20th, 21st and 23rd days
of January, A.D. 1948, I reported in shorthand the
proceedings of the trial had in the above-entitled
cause, that I subsequently caused my said shorthand
notes to be reduced to typewriting, and that the
foregoing transcript, pages numbered 1 to 408, both
inclusive, constitutes a full, true and accurate tran-
script of said proceedings, so taken by me in short-
hand on said dates as aforesaid, and of the whole
thereof.

Dated this 11th day of March, A.D. 1948.

/s/ IRA G. HOLCOMB,

Court Reporter. [409]

In the District Court of the United States
for the District of Oregon

Civil No. 3936

PARAMOUNT PEST CONTROL SERVICE, a
corporation,

Plaintiff,

vs.

CHARLES P. BREWER, et al.,

Defendants.

DEPOSITION OF CHARLES P. BREWER
DEFENDANT

Taken as an adverse party on behalf of Plaintiff.

Be It Remembered that, pursuant to the oral stipulation hereinafter set out, the deposition of Charles P. Brewer was taken on behalf of the plaintiff before Ira G. Holcomb, a Notary Public for Oregon, residing in Portland, on the 7th day of January, A.D. 1948, beginning at 1:30 o'clock p.m., at Room 503, United States Court House, in the City of Portland, County of Multnomah and State of Oregon.

Appearances:

Mr. F. Leo Smith and Mr. George E. Birnie, of
Attorneys for Plaintiff.

Mr. E. F. Bernard and Mr. Plowden Stott, of
Attorneys for Defendants.

Stipulation

(It is stipulated and agreed by and between the
attorneys for the respective parties that the deposi-

tion of the above-named defendant may be taken on behalf of the plaintiff as an adverse party, at Room 503, United States Court House, in the City of Portland, County of Multnomah, State of Oregon, on Wednesday, the 7th day of January, A.D. 1948, beginning at 1:30 o'clock p.m., before Ira G. Holcomb, a Notary Public for Oregon.

(It is further stipulated that the deposition, when transcribed, may be used on the trial of said cause as by law provided; that all questions as to the notice of the time and place of taking the same are waived; and that all objections as to the form of the questions are waived unless objected to at the time the questions are asked; and that all objections as to materiality, relevancy and competency of the testimony are reserved to the parties until the time of trial.

(It is further stipulated by the attorneys for the respective parties that the reading over of the testimony to or by the witness and the signing thereof are expressly waived.) [2*]

Mr. Bernard: You understand, Mr. Brewer, that, after your testimony has been transcribed by the Court Reporter, you have the privilege of reading it over and signing your deposition; or you may waive that.

Mr. Brewer: Let it go as it is. I will waive signing it.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

CHARLES P. BREWER

one of the defendants herein, produced as an adverse party on behalf of the plaintiff, having been first duly sworn to testify the truth, the whole truth and nothing but the truth, was examined and testified as follows:

Direct Examination

By Mr. Smith:

Q. Mr. 'Brewer, according to the pleadings, I believe it is true that you acknowledge signing the sales agent agreement with Paramount Pest Control Service?

A. I signed the franchise, as I understand it.

Q. Did you consider that as a binding and valid contract?

A. At the time it was signed.

Q. Did the time ever come when you did not consider it as a valid and binding contract?

A. After they had refused to live up to it, I couldn't see where it was worth anything.

Q. What date was that?

A. That was shortly after the first of the year, 1947; was along about, oh, between the first of February and March. [3]

Q. Some time along the first of February or March, you considered that the contract was no longer binding?

A. It had not been lived up to at that time.

Q. But, prior to that time, you did acknowledge it as a binding contract?

A. Prior to then, yes.

(Deposition of Charles P. Brewer.)

Q. Is there any reason, other than your contention that they did not live up to it—Is there any other reason why you did not consider it a binding contract?

A. Other than that they did not live up to it and according to the way it was amended, shall we say, amended verbally.

Q. I think “modified” is the better word.

A. Or modified. That is a better word, yes.

Q. But, other than that, you considered it a binding contract?

A. It would have been had they lived up to it. I don't understand just what you are asking, there.

Mr. Stott: If you do not understand a question, I think you have the right to ask him to explain any part of the question you do not understand.

Q. (By Mr. Smith): What part don't you understand?

A. I don't understand what you mean by did I consider it a binding contract. It was a contract—It was acknowledged by both of us—and as long as they live up to it—When they refused to live up to it, I couldn't see that it was any more binding. [4]

Q. When did you first notify them that you did not consider it as a binding contract?

A. I didn't notify them in those exact words.

Q. What words did you use?

A. I notified them I would no longer be connected with them if they did not live up to it.

Q. When did you notify them of that?

(Deposition of Charles P. Brewer.)

A. I notified them of that in February or March the first time, again in April and in June.

Q. Was that notification in writing?

A. That was verbal.

Q. When was the first time you made any written notification to that effect?

A. About July 24th I wrote them a confirmation of my breaking from them, I think somewhere around the 24th of July.

Q. Will you identify those occasions as to when you orally notified the company that you were terminating the contract unless they lived up to its terms?

A. During the times when Mr. Harold Hilts was here in Portland, balancing the books, checking the books.

Q. Will you state those dates as nearly as you can?

A. I wouldn't know without checking the records as to what dates it was, no. All I can say is some time around the first of March and some time around the first of April and again the latter part of June.

Q. On those occasions was there anyone present besides yourself and Mr. Hilts?

A. My wife was present in February and I don't know for sure whether she was there in April but she was there again in June.

Q. When you say that the company was not living up to its terms, will you state that fully and completely and in detail just what you mean?

(Deposition of Charles P. Brewer.)

A. They are trying to get me to pay them 20 per cent on gross after it had been modified.

Q. That is your full and complete explanation?

A. That was the reason why.

Q. That is the only reason why?

A. That is why.

Q. That is the only reason?

A. That is the only reason why.

Q. When this contract was originally signed, you worked under it according to its terms for how long?

Mr. Bernard: May I ask you to qualify the question? Do you mean "worked under it" unmodified?

Mr. Smith: Yes.

Mr. Bernard: I see.

A. I worked under it until the end of—until Thanksgiving, 1946.

Q. (By Mr. Smith): Then, would you tell the story leading up to its modification? [6]

A. The company had been in the red when I took it over, much to my disgust, and not wanting it, and I carried it myself with the understanding that there would be no payments asked for on the business until it was out of the red and they came through. Mr. Hilts checked the books and kept handing me statements showing how much it was costing me and how it was running in the red, as it was, and, when I saw, even with that growth, it was going to break me and not pay anything at all—so, near the end of November, my wife and I drove to

(Deposition of Charles P. Brewer.)

California and I went to the office of the corporation. I told them I could not carry the business any longer under the conditions it was in. I couldn't financially handle it.

Q. You say you told them. Who?

A. I told T. C. Sibert, the president, and he said he would modify it to make it 50 per cent on net profit if I would carry on. I said, "All right, under that agreement, I can carry on." He asked me then, "Do you want this until the first of the year or do you want it for a year or two, or how do you want it? It is up to you.

I said, "I want it for the life of the contract, as long as we are operating," and he said, "All right. That is the way it will be."

Q. I will ask you if he said that, "When you take a dollar out of the business I will take a dollar out of the business?"

A. He said the words, "When you take home a dollar I take home [7] dollar."

Q. That was the understanding?

A. That was one of the remarks he made, yes. It was understood to be 50 per cent on net profits, because I had to live, regardless.

Q. Was it not finally agreed between you and Ted Sibert that when you took a dollar out of the business he would take a dollar out of the business?

A. Not in that exact category, no. It was understood to be 50 per cent on net profits, equally. I couldn't pay him dollar for dollar because the busi-

(Deposition of Charles P. Brewer.)

ness was in the red and I was living out of my personal income as it was.

Q. Was there anybody besides you and Mr. Sibert present when this modification was made?

A. There were several of the company in and out of the office. He and I were talking more or less personally. His secretary was there, not recording the conversation, though.

Q. Who would you say was present who could have heard the conversation?

A. The conversation, as such, was not exactly heard in its entirety by anyone except at the end of the conversation, Glenn Fisher came in, also Harold Hilts, and Ted Sibert told them that he had just reached an agreement with me—that I could not carry on the way it was, and that we had reached an agreement where we would split the net profits.

Q. Ted Sibert said that in the presence of Glenn Fisher and Harold Hilts? A. Right.

Q. And yourself? A. Right.

Q. And you four were the only ones present?

A. Yes.

Q. Your wife was not present?

A. Not at that particular time that I remember. She could have been, but I would hate to make that too emphatic because I do not remember the exact circumstances.

Q. Was anyone present besides yourself when Mr. Sibert agreed that the duration of this fifty-fifty division of net profits should be continuous and not limited to the first of the year?

(Deposition of Charles P. Brewer.)

A. He told that to Mr. Fisher and Hilts. They were not there when it was agreed upon, though.

Q. You did run along on this contract with the modification until the first of the year?

A. Yes.

Q. Up until that time you had no difficulty as far as your remittances to the company were concerned and your understanding with the company?

A. It was only one month practically and there were no remittances paid.

Q. It was not retroactive to the first of July?

A. Was retroactive to the beginning of the franchise.

Q. So, then, it covered a period of from July 1st on? A. Right.

Q. When did someone from the company tell you that that modification agreement was effective only until the first of the year?

A. Harold Hilts presented me with a statement of what I was supposed to owe the company, some time around the end of February or the first of March, and the statement showed 20 per cent gross business——

Q. Pardon me. You mean 20 per cent of the gross business subsequent to the first of the year?

A. Subsequent from July 1st, from the 1st of July on up.

Q. From the 1st of July on up? A. Yes.

Q. In other words, that statement did not recognize that modification agreement at all?

(Deposition of Charles P. Brewer.)

A. None whatsoever. He presented me with that statement. I had sent them \$500, or close to it. I gave them a check for a balance of four hundred and some odd dollars, and told him after handing him the check—I drove to the airport and told him I was completely done with the whole——

Q. You are traveling a little too fast for me there. Let's go back to this statement that Mr. Hilts presented to you in the latter part of February or the first part of March.

You say that was the first time when anyone from the [10] Paramount Pest Control Service indicated that the fifty-fifty agreement was not going to be lived up to by the company?

A. That is the first, from the corporation, from the time I talked with Sibert. They had not come to balance the books during January.

Q. When Hilts presented you with such a statement and you had a chance to look it over and to analyze it, what did you say to him?

A. I did not look it over or analyze it. I only glanced at it enough to see they were wanting me to pay them 20 per cent. I turned to my wife and told her to make them out a check for the exact amount of dollars necessary, and handed it to him and told him I was done.

Q. When you say you were done, that was at this meeting the latter part of February or the first of March?

A. Yes.

Q. You told your wife to write out a check?

A. Right.

(Deposition of Charles P. Brewer.)

Q. What was the amount of that check?

A. Four hundred and some-odd dollars.

Q. How did you arrive at the amount of that check?

A. His statement showed me owing them nine hundred some dollars and I had already given them \$500, and I gave him the balance and told him I was done.

Q. So, then, you did pay the balance owing, according to his [11] statement?

A. According to the statement, which I knew at the time was not correct.

Q. Even though you knew it was not correct, you wrote out a check for that amount and handed it to Hilts? A. I did.

Q. You did not stop payment on that check?

A. I did not.

Q. And you say that you told Hilts you were done, that you were through?

A. I was through, yes.

Q. But you did not give him any written notice?

A. I did not.

Q. Did you continue to work for the company?

A. I continued in this respect—that was Friday evening, and I would have given them time enough to get someone to take my place.

Q. Yes.

A. And Sunday morning at 9:00 o'clock I received a special delivery letter from Hilts, apologizing and stating that it was supposed to be a fifty-fifty proposition.

(Deposition of Charles P. Brewer.)

Q. Yes. So, when you received that letter, what did you do? A. I continued operating.

Q. Then did you have an adjustment?

A. No. You couldn't adjust anything. I never could understand [12] their figures fast enough to adjust them.

Q. After you received the letter—you received it Sunday morning, is that right? A. Right.

Q. That was around the first part of March?

A. Right.

Q. You continued to work for the company, did you?

A. I continued to work for myself, under that name.

Q. Under this franchise agreement?

A. Yes.

Q. As modified? A. Right.

Q. When is the next time you had any difficulty with Mr. Hilts regarding remittances?

A. That was some time the first part of April.

Q. About a month later?

A. Somewhere around that.

Q. Tell us, if you will, please, the full background and everything that led up to your disagreement with Hilts around the first of April?

A. The first of April he came through to check the books again and presented me with a statement and asked for money. I told him I was not, at that exact time, able to pay it and he said, well, he had to have it.

(Deposition of Charles P. Brewer.)

I told him I could not pay it to him and he said there [13] had to be some arrangement where I could borrow money or something. I told him according to my agreement with the Paramount Corporation I would not have to pay them any money until the business was on its feet and that, if they were going to demand money, if it meant my running into debt to pay them something, I would get rid of it, and he immediately told me, then, they were not wanting me to dump it and get out of it in any way, that they wanted me to hang on and that they would not press payment.

Q. Did you pay Hilts any money at that time?

A. No.

Q. What I meant to say was: Did you give him a check? A. No

Q Payable to the Paramount Pest Control Service? A. No, I didn't.

Q. Did you tell Hilts that you were going on, then?

A. I told him I would dump it if they tried to force payment on me, get me into debt.

Q. What did he say?

A. He said they would not force payment in that case.

Q. Then, was there any other conversation between you and him at that time pertaining—

A. Not pertaining to that.

Q. Pertaining to keeping the franchise or not?

A. No. [14]

(Deposition of Charles P. Brewer.)

Q. When is the next time that you and Hilts came together to make an accounting?

A. I think it was some time in June.

Q. So, between April 1st and June, you and Hilts never got together regarding any accounting?

A. We never saw each other. I was out of town.

Q. During all these times the dealings were with you and Hilts? You never had any agent representing you, did you?

A. I never had any agent representing me?

Q. Like your wife? A. No.

Q. It was you who would carry on your own business? A. Right.

Q. Fine. About when was it in June, Mr. Brewer, that you and Mr. Hilts came together again for an accounting?

A. The latter part—I don't know the exact date; some time, I would say after the 24th.

Q. Tell us, if you will, please, the full and complete story in detail of what took place.

A. He told me—he presented me with another statement from the books, showing moneys that I did not believe I owed. We argued over moneys due them for supplies and some equipment that I had taken over from them and, after arguing around all day, he presented me with a statement, showing me owing them somewhere around \$3,000. [15]

I told him I did not understand it as that and I did not believe it was right. He said, well, he was in a spot himself and wanted some money to take

(Deposition of Charles P. Brewer.)

back with him and asked if I would give him a few dollars, some kind of a token payment. I told him— He said it was correct, as far as he could see. I told him, well, I couldn't see it. I did not have time to check it, but I would give him a check. I gave him a check for \$200, two hundred some dollars. If the statement had been correct, it would have cut off the tail end of it, two hundred and some-odd dollars.

Q. So you did make out a check in odd figures as a payment on that statement which he submitted to you?

A. As a payment on moneys due them.

Q. And that left a balance in round figures?

A. Yes.

Q. And that was on June 24th?

A. Somewhere around the latter part of June, between the 25th and the 1st of July.

Q. So, when Mr. Hilts left you that date, he took a check with him?

A. Yes, I think he did.

Q. And that check was drawn on a Portland bank?

A. Yes.

Q. And you never stopped payment on that check?

A. No. [16]

Q. Did you ever at any time write any letters to the Paramount Pest Control wherein you denied that particular accounting that was had between you and Mr. Hilts?

A. No.

Q. When did you send them a notification in writing of your termination?

(Deposition of Charles P. Brewer.)

A. At the end of July. That was a confirmation of the verbal.

Q. I beg your pardon?

A. That was the confirmation.

Q. What was the verbal language then?

A. I told Hilts according to their figures, according to the way they were going—would not live up to their contract—I was quitting Paramount and getting away from it.

Q. When did you tell him that?

A. I told him that the first part of—it was either the very end of June or the first part of July.

Q. Was that after you had paid him the money?

A. That was right around the time I paid him the money. He was here twice. I can't recall which time.

Q. Was there anybody present besides you and Mr. Hilts when this conversation went on?

A. I don't know whether there was or not.

Q. As to the moneys owing either you or the company, by one or the other, what would you say was the amount that either one of you owed to the other at this time? [17] A. At this time?

Mr. Bernard: May I interrupt here just a moment? We have served a notice to produce the audit made by Goldrainer & Sawtell or Sawtell, Goldrainer & Company—whatever it is—have you got that with you?

Mr. Smith: I do not have that with me, but I think it can be obtained. I think it is in Mr. Ran-

(Deposition of Charles P. Brewer.)

kin's file. The reason that we did not produce it is that we do not think we are required to produce it. If the Court orders us to produce it, we will be glad to produce it.

Mr. Bernard: Well, I want to say to the witness that if he needs any documentary evidence in order to answer the question intelligently, he is entitled to have it.

Mr. Smith: Well, I will put the question to the witness and then we will let him answer it.

Mr. Stott: Mr. Brewer, did you understand what Mr. Bernard said.

A. Will you repeat the question?

Mr. Stott: Repeat the question. Read the question, Mr. Reporter.

(Question read.)

A. I can't say the exact amount because of not having the audit.

Q. (By Mr. Smith): To the best of your knowledge, what do you believe the amount to be?

A. I don't know. I would hate to say unless I had the audit [18] and inventory of equipment turned over to them.

Q. Are you contending that the company owes you any money? A. I am.

Q. How much are you contending that they owe to you?

A. I don't know any particular figures except I believe the audit will show around \$2,000.

(Deposition of Charles P. Brewer.)

Q. Have you at any time stated what you believe the company owes you?

A. They won't talk to me. They won't even get on the phone.

Q. I asked you if you have ever stated——

A. I cannot.

Q. You have not stated it? A. No.

Q. Do you deny that you owe any money to the company? A. As a final settlement, yes.

Q. Did you at any time make a claim for \$700 by reason of your performance of the contract as modified? A. I cannot contact any of them.

Q. You have not answered the question.

A. I tried to.

Mr. Stott: Read it.

(Question read.)

A. Not to them.

Q. (By Mr. Smith): Did you make it through your attorneys? A. In an affidavit. [19]

Q. In an affidavit?

A. Yes, or answer, I would say.

Q. So, in your pleadings you do contend that the company is indebted to you in the sum of \$700 by reason of your performance of the contract as modified? A. I imagine I did.

Q. You also contend that the reasonable value of the supplies and equipment belonging to yourself and turned over by you to the plaintiff is the reasonable amount of \$1,350?

(Deposition of Charles P. Brewer.)

A. That is as far as I can say, without the inventory that we took at that time.

Mr. Smith: At this time I want to advise you that I do have the books of the company, the books that Mr. Brewer kept, and they are available to you if you want them. You can also take them providing—they will be given to you as an attorney.

Mr. Bernard: The books from which this Sawtell, Goldrainer & Company audit was made?

Mr. Smith: Yes. Do you want these books?

Mr. Bernard: I want the audit.

Mr. Smith: Do you want the books?

Mr. Bernard: No, I don't want the books now. I may want them later. If I do, I will ask for them.

Mr. Smith: I wanted to make the offer and wanted it to be in the record that I did offer you the books at this time.

Q. Mr. Brewer, do you recall giving to the Paramount Pest Control [20] Service, on February 6, 1947, a check for \$338?

A. I don't recall the figures or why that was given.

Mr. Bernard: At the pre-trial hearing the Court permitted these exhibits to be marked with the understanding that we would be permitted an inspection of them. When will you be through with them so that we can have them?

Mr. Smith: Any time now.

Mr. Bernard: All right.

(Deposition of Charles P. Brewer.)

Q. (By Mr. Smith): This check dated February 6th in the sum of \$338, signed by Rosalie Brewer, that is the check I am referring to. Did you cause that check to be made out and given to the Paramount Pest Control Service?

A. I am responsible for it.

Q. That is right.

A. That is all I can say. I don't recall—I can understand it now.

Q. So, you did give that check to Mr. Hilts at that time? A. No, it was mailed to them.

Q. And this is the statement which you prepared along with it? A. Yes, that is the statement.

Q. Is there any explanation you want to make of it at this time?

A. \$250 of that was half of the \$500 I had paid them before Hilts and I tangled the first of March.

Q. So, then, you did recognize the franchise agreement up until that time? [21]

A. I always recognized it as modified. This was to apply on moneys due to them.

Q. Then, is it your contention that this check (Plaintiff's Pre-Trial Exhibit No. 30) which you gave them, for \$338—what was that payment for?

A. That was for Invoice No. 2733, Invoice No. 2776 and Invoice No. 2707 and \$250 to apply to the franchise.

Q. This \$250 to apply to the franchise, was that on a fifty-fifty basis or a 20 per cent basis?

A. That was the fifty-fifty basis.

(Deposition of Charles P. Brewer.)

Q. That check is Exhibit No. 30, isn't it?

A. Yes.

Q. And the memorandum that we are speaking of is Exhibit No. 31? A. Yes.

Q. Now, I will ask you, Mr. Brewer, if this is your signature on this check dated March 6, 1947?

A. It is.

Q. We are speaking of Exhibit No. 30?

A. Right.

Q. That is a check for \$250 to the Paramount Pest Control Service? A. Right.

Q. And that is to apply on the 1946 franchise?

A. Right.

Q. Is that \$250 calculated on a fifty-fifty basis or a 20 per cent [22] basis?

A. On a fifty-fifty basis.

Q. I show you a check dated March 13, 1947, being Exhibit No. 34. That check is signed by you, is it not? A. It is.

Q. Payable to the Paramount Pest Control Service? A. Yes.

Q. In amount \$494.25? A. Right.

Q. Is that correct? A. Yes, sir.

Q. I notice on the memorandum, Exhibit No. 35, which accompanied it, that you have here listed "Franchise Bal. for January and February," and that franchise balance is \$494.25. That is the correct amount, is it not?

A. That is what that covers, yes.

Q. You made up those figures, didn't you?

A. No, I didn't.

(Deposition of Charles P. Brewer.)

Q. You recognized those figures to be correct, didn't you?

A. I recognized that is what blew up the bandwagon with Paramount and myself.

Q. But that was the amount which Mr. Hilts submitted to you?

A. That is the amount he submitted.

Q. And, in turn, you wrote out a check for \$494.25? A. I did. [23]

Q. And that was the odd figure that would leave a balance of \$500?

A. That \$500 had been paid.

Q. That is correct. Thank you for the correction. Then, that would pay it in full?

A. That paid that statement in full, yes.

Q. This franchise, how is that figured, on what basis?

A. That is these other two checks of \$250 — fifty-fifty net profits.

Q. Is the franchise for January and February computed on a fifty-fifty basis or on a 20 per cent basis?

A. That statement was handed to me as a 20 per cent.

Q. Yes.

A. And I would not accept it. I did pay the \$494.25 only because I knew that I owed them at least \$494.

Q. But this is the statement and it was computed on a 20 per cent basis? A. It was.

(Deposition of Charles P. Brewer.)

Q. You were told by Mr. Hilts at that time that the amount owing on the franchise was \$994.25, and that it was computed on a 20 per cent basis?

A. He told me that and I told him I was through with him.

Q. But, nevertheless, you did pay him the sum of \$494.25 on that statement? A. I did. [24]

Q. At that time did Mr. Hilts show you these figures which are represented by Exhibit No. 36?

A. I don't know.

Q. I will ask you whether or not this is in your handwriting, Exhibit No. 36?

A. That is in my handwriting, yes.

Q. And on that document which I refer to as being in your handwriting, Mr. Brewer, is written "July 9, 1947, paid Check No. 413, \$259.61." That is your handwriting?

A. That is my handwriting, yes.

Q. You knew what you were writing when you wrote it? A. I knew what I was writing.

Q. What? A. I did.

Q. I will ask you, Mr. Brewer, if that does not represent a computation made at that time by Mr. Hilts on the 20 per cent basis?

A. I don't know whether it is 20 per cent or not.

Q. That is what you understood at the time?

Mr. Stott: What are you referring to, that exhibit?

Mr. Bernard: That exhibit, No. 36.

Q. (By Mr. Smith): Will you answer the question? A. I can't answer that question.

(Deposition of Charles P. Brewer.)

Q. When you paid this check for \$259.61 that was a payment on a balance owing to the company as represented by Mr. Hilts, is [25] that right?

A. That is the check I gave them to knock off the end and leave an even figure only, which I did not have a chance to study nor understand at the time.

Q. So, then, it is your contention that when you paid him this check for \$259.61 you did not have any opportunity to go over the figures?

A. I hadn't.

Q. Why didn't you?

A. Because I was in and out of town, and he pulled a balance of the books and handed me a statement showing what I owed him. If it looked right to me as I understood the books, there wasn't too much argument; if it did not look right to me, there was an argument.

Q. Did this look right to you?

A. It didn't look right to me.

Q. Then why did you pay it?

A. I gave it to him only because he wanted to take home some money.

Q. You never wrote any letter confirming that, did you? A. No.

Q. You haven't anything in writing confirming that?

A. I only told him that I would carry it during the month of July and I was done with it.

Q. Was anybody present when you told him that? [26]

(Deposition of Charles P. Brewer.)

A. I don't recall whether there was or not.

Q. Mr. Brewer, who kept the books of the Paramount Pest Control Service? A. I did.

Q. When you say you kept the books, you mean you made all of the entries yourself? A. No.

Q. The entries were made either by you or your wife? A. Most of them were.

Q. Who else made entries?

A. Harold Hilts.

Q. Who? A. Harold Hilts.

Q. Did he make any wrongful entries in the books? A. Not to my knowledge.

Q. All of the entries which were made by your wife were made under your direction and supervision? A. Right.

Q. So you do admit responsibility of keeping those books? A. I do.

Q. Are those books correct?

A. To the best of our ability.

Q. And they are understandable by you?

A. They are.

Q. At any time, did you ever have an audit made of those books? [27]

A. Not by a certified public accountant.

Q. Who did you have audit them?

A. There was no complete audit ever pulled on them.

Q. What partial audit was made?

A. Harold Hilts was supposed to have pulled an audit somewhere around the first of March for income tax purposes.

(Deposition of Charles P. Brewer.)

Q. Was there any person, other than Harold Hilts, that ever made a partial or complete audit of the books? A. Not of the books, no.

Q. Well, of your accounts, then? A. No.

Q. Did you ever have any bookkeeping service that would check your books and your accounts?

A. No.

Q. Or any accounting service of any kind?

A. No.

Q. So, the only accountants who ever worked on the books, that is, to your knowledge, were you and your wife and Mr. Hilts?

A. Until I left them, yes. I will take that back. The books were set up by a bookkeeper for Paramount Pest Control Service, Mrs. Jacobs. She worked for the first or second month, some time around the first of July or August, something like that.

Q. Mr. Brewer, the only written notice that you ever gave to the company of the termination of this franchise was your letter of July 24th, correct? [28]

A. The only written——

Q. Is that right? A. That is right.

Q. You had a copy of your sales agent's agreement with the Paramount Pest Control Service?

A. I had.

Q. And do you recognize that it has a provision in there as to how the agreement should be terminated? A. It does.

(Deposition of Charles P. Brewer.)

Q. And, at the time you sent this notice out, you were acquainted with the provision which required that the agreement could be canceled by either party on ninety days' written notice?

A. I was acquainted with it.

Q. Why did you not abide by that provision?

A. Because they would have broke me if I had.

Q. What do you mean by saying they would have broke you if you did that?

A. They would have tried to grab my books, equipment and supplies, if I tried to stay with them ninety days.

Q. Is that the only reason?

A. I notified them that I would not continue with them beyond the month of July and I wrote them a letter confirming that.

Q. When you say you wrote them a letter confirming that, that is the letter of July 24th?

A. It is. [29]

Q. When you asked them to accept your resignation as of August 1st?

A. Right.

Q. The reason that you did not give them ninety days' notice is that, if you had, they would have broken you?

A. Right.

Q. That is the only reason you did not give them the ninety days' notice?

A. Right.

Q. Mr. Brewer, after you ceased working under this franchise agreement, what did you do? Did you go into the pest control service?

A. I went into business for myself under my own name.

(Deposition of Charles P. Brewer.)

Q. You say that you went into business for yourself under your own name. Is it not a fact, Mr. Brewer, that you first went into business under the name of Rosalie Brewer?

A. Yes. She signed the assumed name certificate. She is my wife.

Q. Yes, and that, in truth and in fact, was just a dummy organization, as far as she was concerned?

A. No. She owns half of my business, regardless.

Q. The first business that you went into, that was called what? A. Brewer's Pest Control.

Q. Who filed the assumed business name certificate? A. My wife. [30]

Q. Did that certificate show you as having an interest in the business? A. No.

Q. So you did not have a half interest in the business? A. My wife and I owned it.

Q. But the original certificate which was on file did not show you as a part owner? A. No.

Q. After that Mr. Brewer, did you have your wife withdraw that assumed business name certificate? A. Yes, she withdrew it.

Q. And, simultaneously, did you file a new assumed business name certificate? A. I did.

Q. In that new certificate what did that show regarding who was the owner of Brewer's Pest Control Service? A. Showed myself as the owner.

Q. Does it show your wife as a part owner?

A. No.

Q. Is she or is she not a part owner?

(Deposition of Charles P. Brewer.)

A. There is a community property law in Oregon. She owns half of anything that is mine.

Q. Is that the only way that she has any interest in it, by virtue of the community property law?

A. Well, and being my wife, yes. [31]

Q. But she did not invest any money in it?

A. Our money was invested.

Q. Why was it, when you first went into business, you did not use your own name?

A. I was too busy working Paramount business. I didn't want to take the time off to go up and file it.

Q. When was that filed? A. I don't remember.

Q. Is it not a fact it was filed on or about July 30th? A. On or about there, yes.

Q. Yes, and, to the best of your knowledge, it was July 30th? A. I suppose it was.

Q. You say the only reason that you had it filed in her name was that you were too busy to do it yourself? A. I was working as Paramount.

Q. Yes.

A. I did not feel like going up and filing any assumed name certificate under the name of Brewer.

Q. Why?

A. I was busy and I was still with the Paramount.

Q. Was it for both of those reasons?

A. I was busy.

Q. Then, the fact you were still working for Paramount did not make any difference?

A. Made a lot of difference. [32]

(Deposition of Charles P. Brewer.)

Q. Well, I want you to tell the whole story. Just don't answer one question halfway. Tell us why it is that you had her fill out the assumed business name certificate instead of you having it filled out yourself. Tell us the whole story.

A. She could go out without interfering with Paramount business. I could not.

Q. What do you mean by that?

A. Well, I was working in the interest of the company named Paramount Pest Control Service.

Q. In other words, you felt you would be violating your franchise?

A. No. I felt I would be violating my own personal interests if I would take time off from Paramount business to go and file an assumed name certificate.

Q. In other words, you felt you owed all your time to the Paramount interests? A. I did.

Q. And, being scrupulous about that, you did not even want to take time off to go up to the Court House to file this certificate? A. Right.

Q. Is it not a fact that you could have just signed your name to the certificate and sent somebody up to the Court House to file it for you?

A. Someone had to go up and get it.

Q. But the only reason that you put it in her name was that you did not want to take the time to go to the Court House, but you [33] wanted to devote all your time to the Paramount Pest Control Service? A. That is right.

(Deposition of Charles P. Brewer.)

Q. Mr. Brewer, this assumed name of Brewer's Pest Control, when did you commence to work for it? A. August 1st.

Q. So you did work for your wife?

A. We own it together.

Q. So, since August 1st, you have been working for Brewer's Pest Control, originally filed by Rosalie Brewer and then subsequently filed by you?

A. Right.

Q. And continuously all the time, right up to the present moment? A. Right.

Q. When did you first get the idea that you would go into business for yourself?

A. In June, 1947, the end of June or the first of July.

Q. Was that after Mr. Hilts left?

A. Right.

Q. Try to fix the date, as best you can, if you will, Mr. Brewer?

A. Oh, some time between the 9th and 24th of July.

Q. Some time between the 9th and 24th of July is the first time you had definitely made up your mind you were going to quit the Paramount Pest Control Service? [34] A. No.

Q. All right. Tell me when you had made up your mind you definitely were going to quit the Paramount Pest Control Service?

A. The end of June.

Q. The end of June?

(Deposition of Charles P. Brewer.)

Q. Well, I want you to tell the whole story. Just don't answer one question halfway. Tell us why it is that you had her fill out the assumed business name certificate instead of you having it filled out yourself. Tell us the whole story.

A. She could go out without interfering with Paramount business. I could not.

Q. What do you mean by that?

A. Well, I was working in the interest of the company named Paramount Pest Control Service.

Q. In other words, you felt you would be violating your franchise?

A. No. I felt I would be violating my own personal interests if I would take time off from Paramount business to go and file an assumed name certificate.

Q. In other words, you felt you owed all your time to the Paramount interests? A. I did.

Q. And, being scrupulous about that, you did not even want to take time off to go up to the Court House to file this certificate? A. Right.

Q. Is it not a fact that you could have just signed your name to the certificate and sent somebody up to the Court House to file it for you?

A. Someone had to go up and get it.

Q. But the only reason that you put it in her name was that you did not want to take the time to go to the Court House, but you [33] wanted to devote all your time to the Paramount Pest Control Service? A. That is right.

(Deposition of Charles P. Brewer.)

Q. Mr. Brewer, this assumed name of Brewer's Pest Control, when did you commence to work for it? A. August 1st.

Q. So you did work for your wife?

A. We own it together.

Q. So, since August 1st, you have been working for Brewer's Pest Control, originally filed by Rosalie Brewer and then subsequently filed by you?

A. Right.

Q. And continuously all the time, right up to the present moment? A. Right.

Q. When did you first get the idea that you would go into business for yourself?

A. In June, 1947, the end of June or the first of July.

Q. Was that after Mr. Hilts left?

A. Right.

Q. Try to fix the date, as best you can, if you will, Mr. Brewer?

A. Oh, some time between the 9th and 24th of July.

Q. Some time between the 9th and 24th of July is the first time you had definitely made up your mind you were going to quit the Paramount Pest Control Service? [34] A. No.

Q. All right. Tell me when you had made up your mind you definitely were going to quit the Paramount Pest Control Service?

A. The end of June.

Q. The end of June?

(Deposition of Charles P. Brewer.)

A. Yes. I told them I was; told both Hilts and Sibert.

Q. The end of June? A. I did.

Q. What date was that? Fix it.

A. Some time after the 25th.

Q. Some time after the 25th did you make an unequivocal statement to Hilts and Sibert you were going to quit Paramount Pest Control?

A. I told them I would carry the business through the month of March—or July, rather.

Q. Yes. So there could have been no doubt in their minds but what that was an oral notification to them that you would work through the month of July but no longer for Paramount Pest Control Service?

A. I don't know what to say. You start off to say one thing and then change to another.

Q. You answer it.

A. If it can be read so I can understand it——

(Question read.)

A. None whatever. [35]

Q. (By Mr. Smith): Is that correct?

A. That is right.

Q. Prior to telling them that, Mr. Brewer, how long prior to that had you made up your mind you were going to go into the pest control service for yourself?

A. I hadn't made up my mind to do it.

Q. When did you make up your mind you were going into the pest control service?

(Deposition of Charles P. Brewer.)

A. Some time in the month of July.

Q. Approximately when?

A. Oh, between the 10th and 25th.

Q. Between the 10th and 25th, and when was it that you made out your last check to Mr. Hilts?

A. I imagine somewhere around the 9th of July.

Q. The 9th of July?

A. I suppose. It is one of the exhibits here.

Q. Did you make up your mind you were going into the pest control service for yourself before or after you gave the company their last check?

A. It was after.

Q. How soon after?

A. I couldn't say the exact date.

Q. About when?

A. Somewhere between a week or two weeks.

Q. When did you first begin to solicit Paramount Pest Control [36] Service customers?

A. The first day of August.

Q. And prior to that did you solicit any of their customers? A. None whatever.

Q. Prior to that time did you tell any of their customers that Paramount Pest Control Service was not going to be rendering pest control service any longer? A. I did not.

Q. Did you advise them that there was going to be a change? A. Who?

Q. Any of the customers that you were servicing for Paramount Pest Control Service?

A. Oh, yes. I notified some that I was leaving Paramount.

(Deposition of Charles P. Brewer.)

Q. When was the first time that you notified any customers that you were leaving Paramount Pest Control Service?

A. After I made up my mind to.

Q. Fix that on a calendar date.

A. Oh, well, it would be some time during July.

Q. During the month of June you never told any customers you were leaving Paramount?

A. I had no intention of it at that time.

Q. But during the month of July you did?

A. I told a few, yes.

Q. When you say you told a few, how many did you tell? A. I have no idea. [37]

Q. Well, then, if you have no idea, how can you say you told a few?

Mr. Bernard: I object to the question as being argumentative; object to the form of the question.

Mr. Smith: Can it be answered?

Mr. Bernard: Surely.

A. I don't know whether——

Q. (By Mr. Smith): Would you name some of them that you told?

A. I told Safeway Stores, Incorporated.

Q. Who else?

A. I told Albers Milling Company.

Q. Yes.

A. Fisher Flouring Mills—no, I didn't. Hudson-Duncan Company.

Q. Who else? A. I know of those three.

Q. What did you tell them?

(Deposition of Charles P. Brewer.)

A. I told them that I was leaving Paramount.

Q. Didn't you also tell them you were going into business for yourself?

A. I don't know whether I did or not.

Q. Didn't you also tell them you could render the same service to them?

A. I told them that the first of July, or the first day of August. I told them I could do that.

Q. Did you ever tell anyone, prior to the first day of August, [38] that you could render pest control service?

A. I don't remember the exact—not the exact time.

Q. I think if you will just take a second to think it over, Mr. Brewer, you can definitely say whether or not you told any Paramount Pest Control customer, prior to August 1st, that you could render them pest control service.

Mr. Bernard: I object to that as not being a question. It is merely a statement to the witness that if he thinks it over he can definitely state something. There is no question.

Mr. Smith: That is right.

Q. Bearing in mind what I have said, Mr. Brewer, I will ask you the same question again. Would you care to answer it?

A. What question?

Q. Whether you told any Paramount Pest Control customers, prior to August 1st, that you could render, as an individual, pest control service to them?

(Deposition of Charles P. Brewer.)

A. I probably told one or two that I could.

Q. Then the purpose of telling them that was to get their business?

A. I was asked what I was going to do, probably.

Q. As a matter of fact, on August 1st, you stepped right in and took over a great number of Paramount Pest Control Service customers?

A. No. We went soliciting August 1st.

Q. Of course, when you went soliciting, you went to those whom [39] you, as a Paramount Pest Control Service agent, had previously solicited and served? A. Some of them were, yes.

Q. Whom did you talk to at Hudson-Duncan?

A. Herb Lacey.

Q. At Albers, you talked to Mr. Flanagan?

A. Right.

Q. Fisher Flouring Mills, did you talk to Miss Dayton? A. I don't know.

Q. Some woman there anyway?

A. Some woman there. I never talked to Fisher Flouring Mills myself.

Q. Safeway Stores, you talked to Mr. Blair there? A. Right.

Q. Who are some of the others that you had spoken to? A. Those are the ones I remember.

Q. How about over at this Pioneer Fruit Company?

A. I never talked to anyone in Pioneer Fruit.

Q. Did you talk to any of these fruit people over there? A. I did not.

(Deposition of Charles P. Brewer.)

Q. There is one other thing I want to get to. When you set up this Brewer Pest Control Service, whom did you hire to work for you?

A. August 1st, I hired Raymond Rightmire.

Q. What other men did you hire? [40]

A. And Earl Merriott, shortly thereafter or at that time. I don't remember the exact dates.

Q. Following that, whom did you hire?

A. I hired Carl Duncan somewhere around the 20th of August.

Q. When did you hire Merriott?

A. Some time around the first of August.

Q. When did you hire Rightmire?

A. The first of August.

Q. Whom else did you have working for you?

A. That was all.

Q. These three men, Rightmire, Merriott and Duncan, all three of them were employees of Paramount Pest Control Service? A. Formerly.

Q. Yes. And these men knew the customers of the Paramount Pest Control Service in the Oregon vicinity?

A. They had a list of the territory that they were to service.

Q. And they had serviced Paramount Pest Control customers and they still had that list with them?

A. No.

Q. What happened to that list?

A. It was left at the office.

Q. Were any copies ever made of that list?

A. No, sir.

(Deposition of Charles P. Brewer.)

Q. Even though copies were not made, Mr. Brewer, you boys could, by memory, know the principal customers of the Paramount Pest Control [41] Service? A. We could remember some.

Q. In going your routes and soliciting customers, you, of course, would pick up these old customers of the Paramount Pest Control Service?

A. If they wanted our service, if they ordered our service, we serviced them.

Q. You would solicit them, would you not?

A. We solicited not only Paramount but others.

Q. When you would go in to solicit their service, their business, what would you tell them?

A. Tell them we were the Brewer Pest Control looking for customers.

Q. What would you tell them, as far as the Paramount Pest Control Service was concerned?

A. We didn't tell them anything about the Paramount Pest Control Service.

Q. Did you, at any time, ever say that the Paramount Pest Control Service was not servicing these customers in this vicinity?

A. I never said that, nor any of my men.

Q. Mr. Brewer, at the termination of this agreement, did you turn over to the Paramount Pest Control Service all of the stocks and merchandise, chemicals and equipment that you had previously used for pest control service?

A. After they agreed to settle according to an audit of the books [42] made by a Portland concern,

(Deposition of Charles P. Brewer.)

I agreed to turn over the equipment to them. An inventory was taken of all supplies and equipment and office equipment and supplies, and I turned it over to them, all except two articles which were inventoried and are still waiting for them to come and get.

Q. What two articles were they?

A. It is a spray trailer and a fog machine.

Q. Where are those articles now?

A. Those articles are at my home.

Q. They can come out and get them any time they want to?

A. Yes. I told them that.

Q. Other than these two pieces of equipment, did you retain any of their chemicals?

A. None whatever.

Q. Did you retain any of their stock?

A. Their stock—you are speaking as a corporation, and it was all my equipment and stock. I did not retain it.

Q. In other words, you considered that you had bought these supplies and they were yours?

A. It was my money.

Q. Those things, you did not turn in to the company?

A. Those things, I turned all of them in to the company.

Q. You did?

A. All except those two articles, one of which I would have to park out on the street, and the other one—I couldn't locate [43] it at that particular time. The boys had it.

(Deposition of Charles P. Brewer.)

Q. I am afraid you do not understand my question. In pest control service you need poisons and supplies, things of that kind? A. We do.

Q. Did you turn all of these poisons and supplies and other chemicals back to the company?

A. I turned over the warehouse keys and all supplies in it, also the office.

Q. You did not answer my question directly.

A. I did.

Q. Did you turn back every bit of poisons and supplies which you had previously used?

A. I turned back all supplies and equipment on hand.

Q. When you started out on August 1st, what poisons and supplies did you have?

A. Only what I went out and bought.

Q. Where did you buy them?

A. At the chemical warehouses around town.

Q. From whom did you buy most of them?

A. I bought some of them from this and that and the other.

Q. Where are they located?

A. Northwest district. I don't know their addresses off hand. I bought from McKesson & Robbins, I bought from Northern Wholesale Hardware Company, the Chown Hardware Company—— [44]

Q. Did you buy them for cash or did you set up accounts with them?

A. No. Some of those were paid by accounts and some were paid by cash.

(Deposition of Charles P. Brewer.)

Q. In other words, all the supplies, poisons, chemicals and other equipment which you used subsequent to August 1st were things that you went out and bought yourself as distinct from supplies which you got from the Paramount Pest Control Service?

A. I believe that is misstated. I don't understand it.

Q. Will you state it correctly, then.

A. What was the question?

(Question read.)

A. Those were all the same supplies I had used prior to August 1st.

Q. What I have been trying to get at for the last fifteen minutes is: What have you done with all of the supplies and equipment which you had received from the Paramount Pest Control Service?

A. Didn't receive any from them. I left—all supplies and equipment that I had on hand as of July 31st I left there.

Q. Yes. Then, if such is true, doesn't it follow, as a matter of fact, that all of the chemicals, supplies and equipment, poisons and merchandise, which you used in the Brewer Pest Control Service subsequent to August 1st were equipment, supplies, merchandise and poisons which you bought separately and did not [45] receive from the Paramount Pest Control Service?

A. I bought all supplies and equipment used in the Brewer Pest Control Service after the first of August.

(Deposition of Charles P. Brewer.)

Q. Did you buy any before? A. No.

Q. All that you bought after August 1st you would naturally buy from someone other than Paramount? A. Right.

Q. So, all of the equipment, poisons and things that you had on hand or which you obtained from the Paramount Pest Control Service were either used up or left in the warehouse and turned back to Paramount?

A. I had bought all the supplies and equipment in the State of Oregon for Paramount Pest Control Service, but I left all that with Paramount.

Q. In other words, you did not take anything with you when you left there?

A. I did not take any supplies or equipment of Paramount.

Q. And you did not take any of their poisons?

A. No.

Q. Did you take any of their formulas?

A. They did not have any formulas.

Q. Did you take any of their records?

A. No, I didn't.

Q. Mr. Brewer, regarding this car which you purchased, what [46] was that purchased with? Whose funds? A. My own.

Q. Is that money you took out of the business?

A. Money I wrote a check out of the business for.

Q. Did you consider that money in the business? Did you consider that your money or Paramount's money?

(Deposition of Charles P. Brewer.)

A. It was my money. I had opened a bank account with my own money and I operated from that bank account.

Q. So, the money which you used to buy that car with was your own personal funds?

A. It was my company funds.

Q. You were not indebted to the company at that time?

A. What do you mean, indebted to the company?

Q. That was not money owing to the company at that time?

A. What company?

Q. Paramount.

A. Corporation?

Q. Yes.

A. I may have owed them money.

Q. But it was not due?

A. It could not have been due because I did not have it to pay to them.

Q. What?

A. I did not have money to pay to them. They could not press me for payment according to our agreement. [47]

Q. I see.

A. And when they refused to furnish me a car or truck or any conveyance, I told them I had to have a car and Ted Sibert told me personally that I had to go and buy one if I wanted it.

Q. Did you go out and buy one?

A. I did.

Q. When did you buy it?

A. I don't remember the date.

Q. You can give us the approximate date.

A. I don't know. It is someplace in your complaint I think.

(Deposition of Charles P. Brewer.)

Q. Give us the date the best you can.

A. I don't have any idea; somewhere in that spring.

Q. March?

A. Some time between March and June.

Mr. Stott: What year?

A. 1947.

Q. (By Mr. Smith): The money which you took to buy that with was money that was drawn out of the Paramount Pest Control account?

A. In Portland, yes.

Q. That car, was that put in the name of the Paramount Pest Control Service?

A. It was not.

Q. Was it put in your own personal name?

A. It was put in my personal name. [48]

Q. Do you have that car now? A. I do.

Q. Do you use that car in the business?

A. I do.

Q. Mr. Brewer, you of course are acquainted with this clause in the contract which provides: "The agent further agrees that for a period of three years after the termination of this agreement, or his period of employment, he will not, directly or indirectly, communicate or divulge to or make use of for the benefit of any person, partnership or corporation any of the trade secrets, formulas, processing methods of the company, or the names, addresses or requirements of any of the customers of the company or any other information related to the com-

(Deposition of Charles P. Brewer.)

pany's business which he may have acquired or learned during his employment."

Have you lived up to that provision?

Mr. Bernard: I object to that as calling for a conclusion of the witness, calling for his opinion on the issues as framed by the pleadings.

Mr. Smith: Can he answer it, subject to the objection?

Mr. Bernard: No, I will not have him answer that unless the Court orders it.

Q. (By Mr. Smith): Then, in this agreement, you agreed further that you would not, either as an employee, employer or otherwise, canvass, solicit or cater to any of the customers of the company [49] which you may have known by virtue of your employment. You have, however, solicited these customers, have you?

A. I have solicited firms that were at one time on Paramount's books.

Q. Do you consider it is your right to go into the pest control service in this area?

A. There is nothing that says I can't in the contract.

Q. There is a provision in the contract which prohibits you from canvassing or soliciting these customers, isn't there?

Mr. Bernard: I object to that as the contract speaks for itself.

Mr. Smith: That is true, but I want to get this man's idea on it.

(Deposition of Charles P. Brewer.)

Mr. Bernard: His ideas are framed by the pleadings in this case, set out in writing. If you want to inquire as to the fact as to what he has done, I have no objection, but as to his opinion as to the legal conclusion that followed from his actions, then I object to that. In other words, you are asking for his opinion on the legal questions involved in this case. I have no objection to your asking what he has done; I haven't the slightest objection. Then it will be for the Court to say whether or not what he has done is a violation of the contract under the issues in the case and the facts in the case.

Q. (By Mr. Smith): Mr. Brewer, all the time that you were working as agent for the Paramount Pest Control Service, they were [50] a California corporation; you, of course, knew that they were a corporation?

A. I knew—I understood they were a corporation.

Q. You dealt with them as such?

A. As such.

Q. Yes. When is the first time you told the Paramount Pest Control Service, if you told them at all, that you were going into the pest control service for yourself?

A. About August 6th.

Q. So you were already in the business before you notified them of it?

A. Yes.

Q. When you notified them of it, they had already known it before anyway?

A. They asked me if I was.

(Deposition of Charles P. Brewer.)

Q. In other words, not so much a notification as it was an admission? A. Right.

Q. Mr. Brewer, if I understand you correctly, regarding this contract, your only contention of a breach is your contention that Mr. Hilts insisted on a division of 20 per cent instead of the agreed division of fifty-fifty, as made by him and Ted Sibert?

A. No, Ted Sibert revoked that himself in the presence of Hilts, stating it would go back on a 20 per cent the first day of July. I told him I would not have anything to do with them on a 20 per [51] cent basis.

Q. When did he say that?

A. About the first of July.

Q. He said that about the first of July?

A. Yes.

Q. Who was present at that time?

A. I don't remember all that were there. It was in the office of the corporation there in Oakland.

Q. But other than this question of whether it should be a 20 per cent basis or fifty-fifty basis, you did not make any other contention that the company breached their contract?

A. They breached it on one point. They tried to run it back to 20 per cent and I would not operate under that setup.

Q. As far as your present frame of mind is concerned, you had no other complaint?

A. I had lots of complaints.

(Deposition of Charles P. Brewer.)

Q. Well, I mean complaints that were serious enough to be considered a breach of contract.

A. Not any one of them.

Q. Then what were your complaints in the aggregate?

A. It would take a long time to try to enumerate them.

Q. We have got the time. Go ahead and enumerate them.

A. Well, for one thing, I couldn't trust them.

Q. You couldn't trust whom?

A. They had broken too many managers over too many pretenses [52] that I knew of up and down the Coast; they had gotten too many managers in the red by making them borrow money to give to them; they were always after me to try to get me to borrow money and give to them; they tried to get me to change my personal automobile from my name into the name of the Paramount Pest Control Service; in twelve months' time they were after me at least nine times to do that; and I knew they had broken managers up and down the line and run in and grabbed supplies and equipment. I knew they could not be trusted when they would not live up to their contracts and I broke from them.

Q. Anything else.

A. That is a part of it; a good part of it.

Q. What is the other part?

A. That is the majority of it.

Q. Is there anything else that is of any concern, that is not trivial?

A. Not too much so, no.

(Deposition of Charles P. Brewer.)

Q. Mr. Brewer, what did you instruct Rightmire and Duncan and Merriott to say when they approached customers?

A. I never instructed them to say anything.

Q. In other words, they were on their own to say anything they chose?

A. No. They were not to knock anybody. That has always been my policy.

Q. I appreciate that, but as to what explanation that they [53] should give as to why they were not with Paramount any more?

A. They were working for Brewer's Pest Control.

Q. Did you instruct them to always tell customers, before they went in to make a service and when they went in to make a canvass—did you instruct them to always explain to the customer that they were not any longer working for Paramount Pest Control Service?

A. I never instructed them on any sales talk. They are men of integrity and they would not go in talking about Paramount Pest Control Service when they were working for the Brewer's Pest Control.

Q. So you never gave them any instructions as to what to say when they approached a customer?

A. Never at any time.

Q. Regarding yourself, Mr. Brewer, when you approached a customer, did you always explain to the customer that you were no longer working for Paramount Pest Control Service?

(Deposition of Charles P. Brewer.)

A. If it ever came up and they ever asked me, I did.

Q. If they did not ask you——

A. I told them I was with Brewer's Pest Control.

Q. But you always skipped around that tender point as best you could, is that right?

A. There was no tender point.

Q. But you would never tell them, then, that you were no longer representing the Paramount Pest Control Service, unless [54] they asked you?

A. If they had known I had been with Paramount Pest Control Service, I told them that I was in business for myself under my own name.

Q. Did you do that in every instance?

A. Lord, no.

Q. So, there were instances, then, when you would go in and do a servicing job for someone who had previously been served by you when you were working for Paramount Pest Control Service, and at that time you neglected to tell them you were in business for yourself?

A. They seldom asked me if I was. If so, I always said yes. I solicited lots of accounts I had never known before, never had been near under the name of Paramount. I went in and told them I was Brewer's Pest Control, and as to any accounts that had previously been Paramount Pest Control Service accounts, I went in and told them I was Brewer's Pest Control.

(Deposition of Charles P. Brewer.)

Q. Any time you served in your own individual capacity some customer who was previously a Paramount Pest Control Service customer, you always told them that you were no longer with Paramount?

A. I did not mention Paramount. Our talk was, when we entered a building, regardless of whether it was a sales pitch or service, "We are Brewer's Pest Control." That is the way we enter buildings.

Q. Is it not a fact, Mr. Brewer, that there are instances when you would go ahead and do your job and then it was not until the job was finished and the ticket was written out for it, for the job, after the job was completed, that you would tell the party you were no longer connected with Paramount?

A. No, sir. Any time we do service, the people know they are having service from Brewer's Pest Control.

Q. Every time? A. Always.

Q. Going back to this assumed business name, the business, you say, was put in Rosalie Brewer's name, principally because you did not have time to go up to the Court House that particular afternoon; then, later on, her certificate was withdrawn and yours was put on record. Does she have an interest in that business? A. She is my wife.

Q. Yes. Well, did you figure that you and she started out from scratch and that she helped you in that business and, therefore, she had an interest in the business? Is that it?

A. Half the money that is used or made is hers.

(Deposition of Charles P. Brewer.)

Q. So she really would have an interest in the business even though we did not have the community property law?

A. The community property law makes——

Q. You don't answer the question.

A. What was the question? [56]

Mr. Bernard: If you are not familiar enough with the law to answer that, you are free to say so, Mr. Brewer.

A. Well, all I know is that, as my wife, she has an interest in anything I have.

Mr. Smith: Does she have that by virtue of the fact that she is your wife or by virtue of the fact that she worked in the business?

A. By virtue of the fact that she is my wife.

Q. Well, did she work in the business with you?

A. She is not on the payroll, if that is what you mean.

Q. Does she come down to the office and do any work?

A. She helps me out now and then when I need help.

Q. Does she work in the office?

A. She does when she helps, yes.

Q. You are a little evasive. I want you to come right out and lay it right on the line.

A. She is not a paid employee. If there is any office work to be done that I don't do and I ask her to do it, she does it.

Q. How many hours a week or a month or how much time does she put in?

(Deposition of Charles P. Brewer.)

A. It varies; sometimes an hour a day, days when she works; two or three or four hours a week.

Q. In other words, she does not get any salary?

A. None whatsoever.

Q. But she does participate in the profits of the company? [57]

A. There hasn't been any profits. Any money I make, she is bound to enjoy part of it as my wife.

Q. In other words, she can draw money out of the company and use it for family expenses or for buying her clothes?

A. Not for herself, she cannot.

Q. How is it her money, then?

A. It isn't her money as long as it is in the company.

Q. Then, is it your contention that she has an interest in the business because of the community property law?

A. No, by virtue of being my wife.

Q. And not by virtue of the fact that she does any work?

A. The work is not the reason that gives her any part of the business?

Q. What?

A. The work that she does is not the reason for her owning any part of the business.

Q. In other words, you just feel that any wife has a financial interest in her husband's business?

A. She has an interest in it.

Q. You consider her as a part owner?

A. I consider her as my wife.

(Deposition of Charles P. Brewer.)

Q. Answer the question. Do you consider her as a part owner?

A. As my wife, she owns anything I own.

Q. In other words, you and your wife own the business together? A. Under the law, we do.

Q. So, then, you consider, as far as title to this business is concerned, it is just as much your wife's as it is yours?

A. As much her business as mine, I suppose. I don't know how the law would read on that.

Q. Getting back to this question which was not answered, for the purpose of the record, Mr. Brewer, I want it made clear. Mr. Bernard made an objection to your answering this question about you doing business within a period of three years. Of course, this is not Mr. Bernard's deposition. It is your deposition but, nevertheless, he is your attorney and apparently I would conclude he advises you not to answer the question, so I want the record clear as to whether you, Mr. Brewer, refuse to answer the question.

Mr. Bernard: If it is the question I objected to, he certainly does object to it and I will advise him not to answer the question.

Q. (By Mr. Smith): You are, Mr. Brewer, of course, following the advice of your attorney?

A. Of course.

Q. I will ask you, in conducting this pest control service for the Brewer Pest Control Service, are you using the same methods or similar methods as used with the Paramount Pest Control Service?

(Deposition of Charles P. Brewer.)

A. I use methods used by the pest control industry.

Q. You have not answered my question. [59]

A. Paramount—I don't know all of their methods. I know our methods. Our methods were not always Paramount's methods.

Q. But you do use Paramount's methods?

A. I don't know what their methods are except the ones—I know the methods that we use.

Q. Did you work in pest control service before working for Paramount Pest Control Service?

A. I did not.

Q. Did you go through any period of training with them? A. One week.

Q. Whom did you work under?

A. Carl Duncan.

Q. During this period of one week, did Carl Duncan show you the way they eradicated insects and various pests?

A. As much as he could, he did, yes.

Q. Whereabouts did you work with Carl Duncan? A. In Oakland, California.

Q. Working with him that one week, that is the first time you ever had any pest control experience?

A. It is.

Q. Then, after working that one week with Carl Duncan, what did you do? A. I went selling.

Q. Does that mean soliciting accounts?

A. Soliciting accounts. [60]

Q. How long did you solicit accounts?

A. Oh, a week or two weeks.

(Deposition of Charles P. Brewer.)

Q. Whom did you work under then?

A. They had a sales manager, I think you might call him, in the office that was more or less the head of the personnel.

Q. Was that out of the Oakland office?

A. Right.

Q. After these two weeks selling, what did you do?

A. Did a little trouble shooting here and there.

Q. Who were you working under?

A. The same party, personnel—John Kehoe.

Q. John what? A. John Kehoe.

Q. How long did you do this trouble shooting?

A. Oh, for a week or two.

Q. Then what did you do?

A. I was shipped to Oregon.

Q. When you came up to Oregon, did you immediately take over the Oregon office?

A. Shortly thereafter, yes. There was no office at that time.

Q. You replaced Taylor, did you not?

A. Yes.

Q. Taylor had a place where he received office phone calls? A. Yes.

Q. And stored supplies and things? [61]

A. Yes, in his apartment.

Q. So you took over where Taylor left off?

A. Right.

Q. Who came up here to help you?

(Deposition of Charles P. Brewer.)

A. Harold Hilts came up to help me get the books—to check the books over, and then he went back to California.

Q. Did anybody else work with you?

A. Not at that time. Had somebody working for the company——

Q. Who was that?

A. Some young fellow with a crippled leg.

Q. How long did he continue to work with you?

A. I took over the 10th of April and I think he stayed on the payroll until the first of May.

Q. Then he was the only man working with you from April to May?

A. Here in Portland. There was one man on the payroll in Salem.

Q. Then, after that, whom did you work with that were Paramount Pest Control employees?

A. Some time around the first of May, Ted Sibert came to Oregon and saw the condition I was in, no help, no work, and he called California and got Carl Duncan to come up and, shortly thereafter, I hired Rightmire to go to work—and Carl Duncan—had him up and worked with him three or four days, something like that. [62]

Q. Carl Duncan, is that the man who taught you and Rightmire most of the tricks of pest control and pest eradication?

A. All that he could, during the time that he was with us.

Q. These methods you were taught while working for the Paramount Pest Control Service, you

(Deposition of Charles P. Brewer.)

used those in your own business, or you use those in your own business now? A. Hardly any.

Q. But you do use some of them?

A. None that the entire pest control industry does not use.

Q. Regarding the formulas and poisons that you put around—you are not a chemist, are you?

A. I am not.

Q. How did you learn to mix these poisons?

A. By going to the County Agent and going and talking to my competitors here in Portland.

Q. Did you learn any of that while you were working for Paramount Pest Control Service?

A. No, they had no formulas.

Q. The Paramount Pest Control Service had formulas, though, didn't they?

A. They didn't have any to my knowledge; at least, they could not supply me with any.

Q. Didn't they have poisons?

A. Yes, they had poisons.

Q. Didn't they supply you with poisons? [63]

A. Raw poisons, yes.

Q. Didn't they tell you how the poisons were to be mixed? A. How they were what?

Q. Mixed.

A. They were not mixed. They were bought direct from the stores.

Q. Is it your contention that all the poisons used by Paramount Pest Control Service are poisons which can be bought over the counter from stores, or prepared? A. Almost exclusively.

(Deposition of Charles P. Brewer.)

Q. Give me the exceptions?

A. They used to make a spray that they said they made themselves. I have no idea what it was or what it consisted of. It was furnished to us in bulk, if we wanted to buy it.

Q. But all other poisons can be bought in stores the same as patent medicines can be bought in stores?

A. To the best of my knowledge, they can.

Q. Is it your contention that there is no such thing as secret formulas that the Paramount Pest Control Service have that you used?

A. None that I ever heard of.

Q. You came to Oregon because you were sent up here by Paramount Pest Control Service?

A. Right.

Q. And some of the customers that you are now serving are customers that you met and knew of because of work you did as [64] agent for the Paramount Pest Control Service?

A. Some of them.

Q. And those you have canvassed and solicited to give their trade to you?

A. I have solicited some customers of theirs.

Mr. Smith: That is all that we have.

Mr. Bernard: I have a question or two that I want to ask.

Mr. Smith: Before I forget about it, I might reiterate that you are welcome to the books or the exhibits any time you want them.

(Deposition of Charles P. Brewer.)

Mr. Scott: We want the audit and you won't give us that.

Mr. Smith: If you ask for it in the right manner and the Court orders it, orders us to give it to you, we will abide by the ruling of the Court.

Mr. Bernard: I should hope you would. That is very generous of you.

Cross-Examination

By Mr. Bernard:

Q. In questioning you about one of these accounts or statements that Hilts presented to you, presented you with, Mr. Smith asked you if you had written any letter denying the account that had been reached between you and Hilts. As a matter of fact, did you and Hilts reach any accounting?

A. Never reached an account.

Q. Now, about this inventory: Tell me what that inventory was [65] and how it was delivered.

A. It was an inventory taken around the first or second day of August by Harold Hilts and myself of the office equipment and office supplies, exterminating equipment and exterminating supplies that I had at the time.

Q. Who took that inventory?

A. That was in the handwriting of Harold Hilts. He and I together made it. He jotted it down as I checked it and called it off and he checked it.

Q. And all of these articles were delivered to the Paramount Pest Control Service?

(Deposition of Charles P. Brewer.)

A. Those were all delivered with the exception of these two items, and I took Harold Hilts out and let him see those items and——

Mr. Smith: If you don't mind an interruption, could you give me those items and tell me where they are?

A. There is one hi-fog machine and one spray trailer.

Q. One hi-fog machine and one what?

A. One trailer.

Q. One spray trailer?

A. A spraying machine trailer.

Q. Whereabouts are they?

A. Those are at my home.

Q. Where is that located?

A. That is at 4929 Northeast 28th Avenue. [66]

Q. 4929 Northeast 28th?

A. Yes. If they are willing to pay for those, they can have them.

Q. That is different. How much?

A. Their value, minus depreciation.

Mr. Smith: I trust you don't mind this interruption?

Mr. Bernard: Go ahead.

Q. (By Mr. Smith): In other words, you have those, but you won't give them up unless you are paid their purchase value less depreciation?

A. That is what they were to pay me for, all of my supplies, and they have not paid me for any of them yet. I do not feel I should turn over more of them under the same conditions.

(Deposition of Charles P. Brewer.)

Q. So, then, if they went out to get them now, they would not get them?

A. At the present moment, no. At the time of the contract, they would.

Q. What?

A. Had they wanted them at the time, when they agreed to settle with me according to the audit, they would have had them if they had come and got them.

Q. They could have had them on August 1st without paying you anything further?

A. They could have.

Q. (By Mr. Bernard): Now, outside of the property that was in [67] the office at the time, about August first, where was the other property, Mr. Brewer?

A. It was in a warehouse at 15th Northwest and Marshall.

Q. How was that delivered to the Paramount people?

A. It was delivered to them in this respect: I had refused them entrance to there until such time as we had made an agreement or reached an agreement that was reached between T. C. Sibert and Harold Hilts and a few others and myself in the presence of the others.

Q. What was that agreement?

A. The agreement was that they would pay me for my supplies and my equipment, both office and extermination, and we would settle our accounts according to a C. P. A. audit of the books done by a Portland accounting firm.

(Deposition of Charles P. Brewer.)

Q. What did you do then towards turning the supplies over to them?

A. I met Harold Hilts and Wendy Fisher up at the building in which our office was and our supplies were stored. I called the manager of the building out there and told him as of that date forward the Paramount Pest Control Service would have the use of that building that I had rented, the room that I had rented there.

Q. And did you have a key to it?

A. At that time I had a key, and I gave them a key then.

Q. Did you discuss with these men who should make that audit? [68]

A. Yes. They asked me who to go to to make an audit and I said I didn't know of any firm in town except one that I knew of that was in the same building where the office was at that time.

I said, "There is a firm there. I know they are accountants," and the next morning—their names, by the way, are Jones and Young.

The next morning T. C. Sibert went to them and told them about the split-up between myself and Paramount, and asked them if they would audit the books. And Mr. Young, as I understand, told him he would.

Mr. Young asked me for my copy of the franchise and got a copy from them, and went in and sat down to do an audit of the books. T. C. Sibert came back and jumped on him and said he understood he was going to try to hang the Paramount Pest Con-

(Deposition of Charles P. Brewer.)

trol Service, and Mr. Young threw both of his hands in the air and told him he wouldn't have anything to do with the books, that is all, and he in turn took up the phone and called Sawtell, Goldrainer & Company.

Q. Who did you say took up the phone?

A. Mr. Young told Mr. Sibert he could recommend him or he would call and, from what I understood, Mr. Young called Sawtell, Goldrainer & Company and told them that there was a set of books there that we wanted an audit made of and would they do it and they said they would and they sent a man down there [69] and pulled an audit on those books.

Q. Is that the audit that you have requested an inspection of?

A. Yes, sir.

Mr. Bernard: That is all.

Mr. Smith: You don't want the books?

Mr. Bernard: If I want the books, I know how to get them.

Mr. Smith: All right.

And Further Deponent Saith Not.

(Signature of witness to the foregoing deposition expressly waived by the witness and by counsel for the respective parties.) [70]

[Title of District Court and Cause.]

State of Oregon,

County of Multnomah—ss.

I, Ira G. Holcomb, a Notary Public for Oregon, do hereby certify that on the 7th day of January, A.D. 1948, before me as such Notary, at Room 503 United States Court House, in the City of Portland, County of Multnomah, State of Oregon, personally appeared at the time and place mentioned in the caption and stipulation set out on pages numbered 1 and 2 of the foregoing transcript Charles P. Brewer, a defendant, produced as an adverse party on behalf of the plaintiff.

Mr. F. Leo Smith and Mr. George E. Birnie, of attorneys for plaintiff, appearing in its behalf; and Mr. E. F. Bernard and Mr. Plowden Stott, attorneys for defendants, appearing in their behalf; and the said witness being by me first duly sworn to testify the truth, the whole truth and nothing but the truth, [71] and being carefully examined, in answer to oral interrogatories and cross-interrogatories propounded by the attorneys for the respective parties, testified as in the foregoing annexed deposition, pages numbered 1 to 70, both inclusive, set forth.

I further certify that all interrogatories and cross-interrogatories propounded to said witness, together with the answers of said witness thereto and all objections and motions taken or made, and other proceedings occurring upon the taking of said

deposition, were then and there taken down by me in shorthand and thereafter reduced to typewriting under my direction; and that the submission of the deposition, when fully transcribed, to the witness for examination and reading to or by him, and opportunity to the witness to make any changes in form or substance and signing of same by the witness were waived by the witness and by the parties; and that said deposition has been retained by me for the purpose of sealing up and directing it to the Clerk of the above-entitled Court, as required by law.

I further certify that I am not a relative or employee or attorney or counsel for any of the parties, or a relative or employee of such attorney or counsel, or financially interested in the action.

In Witness Whereof, I have hereunto set my hand and notarial seal this 9th day of January, A.D. 1948.

[Seal] /s/ IRA G. HOLCOMB,

Notary Public for Oregon.

My Commission Expires July 21, 1948. [72]

[Endorsed]: No. 11892. United States Circuit Court of Appeals for the Ninth Circuit. Paramount Pest Control Service, a corporation, Appellant, vs. Charles P. Brewer, individually and doing business as Brewer's Pest Control, Rosalie Brewer, his wife, Raymond Rightmire, Carl Duncan and Earl Merriott, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed April 8, 1948.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
Ninth Circuit

No. 11892

PARAMOUNT PEST CONTROL SERVICE, a
corporation,

Plaintiff and Appellant,

vs.

CHARLES P. BREWER, individually and doing
business as BREWER'S PEST CONTROL;
et al.,

Defendants and Respondents.

ORDER RELIEVING APPELLANT FROM
PRINTING OR REPRODUCING EXHIBITS

On the Application of Paramount Pest Control Service, a Corporation, Appellant in the above entitled matter, and the Affidavit of Kenneth C. Gillis supporting said Application, and good cause appearing therefore;

It Is Hereby Ordered that Appellant, Paramount Pest Control Service, a Corporation, be and it is hereby relieved from printing or reproducing the Exhibits to be used on Appeal in the above entitled matter and that said Exhibits shall be used in their original form.

Dated: April 19, 1948.

/s/ FRANCIS A. GARRECHT,
Judge.

[Endorsed]: Filed April 19, 1948.

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF THE POINTS ON WHICH
APPELLANT INTENDS TO RELY ON
APPEAL; DESIGNATION OF PARTS OF
RECORD TO BE PRINTED

1. Appellant adopts in full the Points on which he intends to rely as specified in the record on file with the above entitled Court.

2. Appellant designates the following parts of the record to be printed, namely: (1) The entire certified typewritten record, the Deposition of Charles P. Brewer, and this statement and certificate, excluding Exhibits. (2) The Order of this Court relieving Appellant from printing or reproducing Exhibits and permitting them to be considered in their original form.

Dated: April 21, 1948.

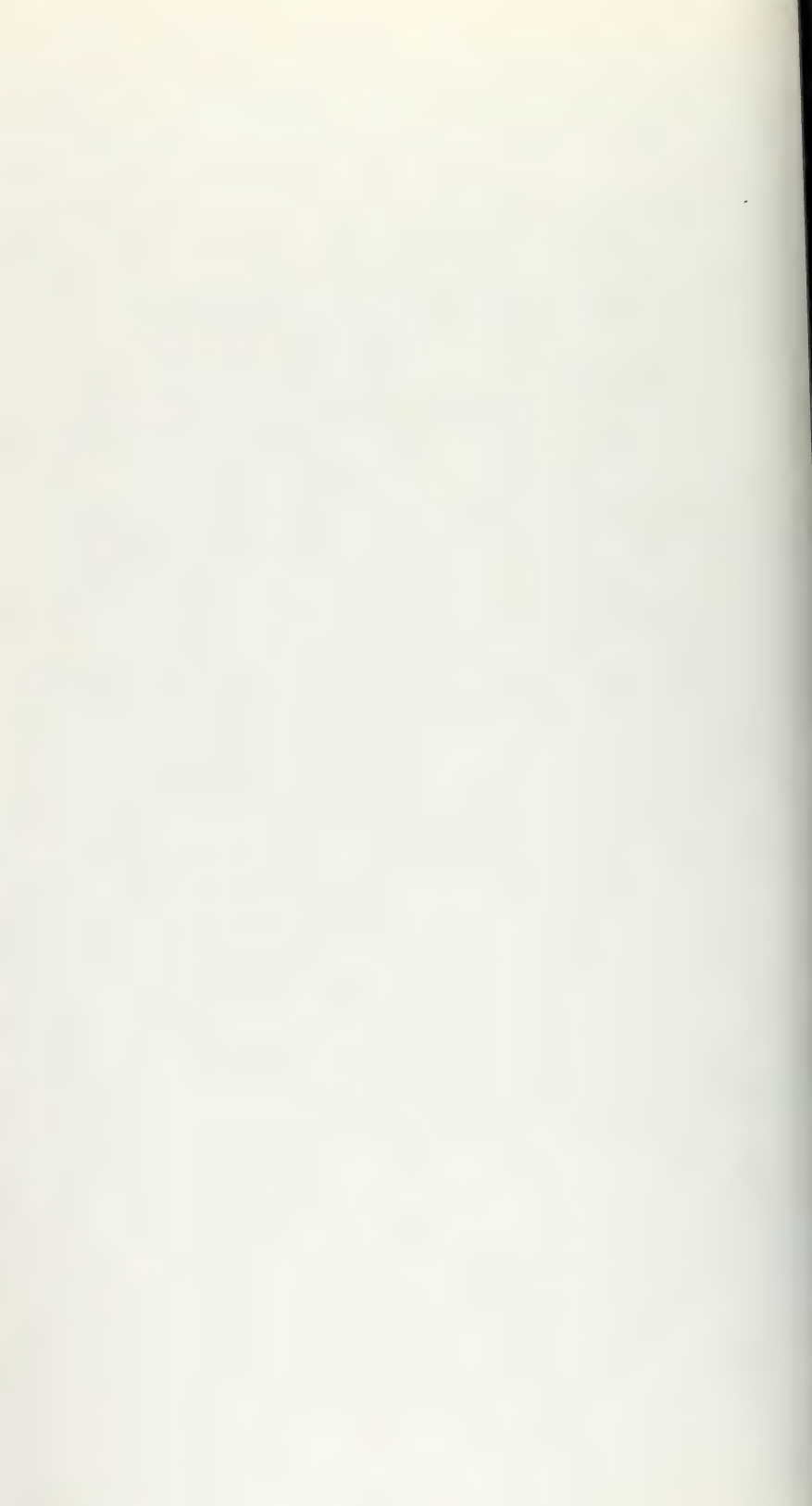
/s/ ROBERT R. RANKIN,

/s/ KENNETH C. GILLIS,

Attorneys for Appellant.

[Affidavit of service by mail attached.]

[Endorsed]: Filed April 22, 1948.



No.12170

United States
Court of Appeals

for the Ninth Circuit

PARAMOUNT PEST CONTROL SERVICE, a
corporation,

Appellant,

vs.

CHARLES P. BREWER, individually and doing
business as Brewer's Pest Control, ROSALIE
BREWER, his wife, RAYMOND RIGHT-
MIRE, CARL DUNCAN and EARL MER-
RIOTT,

Appellees.

~~SUPPLEMENTAL~~

Transcript of Record

In Three Volumes

VOLUME III.

(Pages 539 to 561, inclusive)

Appeal from the United States District Court
for the District of Oregon

FILED

APR 4 1949

PAUL P. O'BRIEN,
CLERK

No.12170

United States
Court of Appeals

for the Ninth Circuit

PARAMOUNT PEST CONTROL SERVICE, a
corporation,

Appellant,

vs.

CHARLES P. BREWER, individually and doing
business as Brewer's Pest Control, ROSALIE
BREWER, his wife, RAYMOND RIGHT-
MIRE, CARL DUNCAN and EARL MER-
RIOTT,

Appellees.

S U P P L E M E N T A L

Transcript of Record

In Three Volumes

VOLUME III.

(Pages 539 to 561, inclusive)

Appeal from the United States District Court
for the District of Oregon

INDEX TO PROCEEDINGS IN DISTRICT COURT AFTER REMAND

	PAGE
Appeal:	
Certificate of Clerk to Transcript of Record on	556
Designation of Record on (DC)	555
Notice of	551
Order Based on Stipulation of Parties includ- ing Appeal No. 11892 in Transcript on....	560
Order Relieving Appellant from Printing or Reproducing Exhibits on	559
Statement of Points and Designation of Parts of Record on (USCA)	557
Statement of Points to be Relied Upon by Ap- pellant on (DC)	552
Certificate of Clerk to Transcript of Record on Appeal	556
Designation of Record on Appeal (DC)	555
Designation of Parts of Record to be Printed (USCA)	558
Findings of Fact and Conclusions of Law	544
Judgment	550

ii.

	PAGE
Memorandum Responding to Mandate to Make Additional Findings	542
Names and Addresses of Attorneys.....	539
Notice of Appeal	551
Opinion	540
Order Based on Stipulation of Parties includ- ing Appeal No. 11892 in Present Appeal....	560
Order Relieving Appellant from Printing or Re- producing Exhibits	559
Order Vacating Judgment of Feb. 14, 1948....	544
Statement of Points on which Appellant Intends to Rely (DC)	552
Statement of Points and Designation of Record (USCA)	557
Stipulation of Parties including Appeal No. 11892 in Present Appeal	561

NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

For Appellants:

KENNETH C. GILLIS,

1103 Central Bank Building,
Oakland, California.

ROBERT R. RANKIN,

710 Yeon Building,
Portland, Oregon.

For Appellees:

COLLIER & BERNARD,

EARL F. BERNARD,

WM. K. SHEPHERD,

1220 Spaulding Building;

PLOWDEN STOTT,

Yeon Building,
Portland, Oregon.

In the United States Court of Appeals
For the Ninth Circuit

No. 11,892

PARAMOUNT PEST CONTROL SERVICE,
a corporation,

Appellant,

vs.

CHARLES P. BREWER, individually and doing
business as Brewer's Pest Control, ROSALIE
BREWER, his wife, RAYMOND RIGHT-
MIRE, CARL DUNCAN and EARL MER-
RIOTT,

Appellees.

Appeal from the District Court of the United States
For the District of Oregon

Before: Denman, Chief Judge, and Bone,
Circuit Judge, and McCormick, District
Judge.

McCormick, District Judge:

OPINION

This appeal is from the final judgment of the district court for the District of Oregon, entered February 14, 1948, denying an injunction and dismissing the complaint in the court below without costs.

Jurisdiction of the action in the district court is unquestionable under the record before us. Title 28, United States Code, section 1332. The appeal

taken from the whole of the final judgment is before us under Title 28, United States Code, section 1291 and Rule 73, Federal Rules of Civil Procedure.

The record discloses an action by Paramount Pest Control Service, a corporation (herein called Paramount) as plaintiff in the district court against Charles P. Brewer, individually and doing business as Brewer's Pest Control, Rosalie Brewer, his wife, Raymond Rightmire, Earl Merriott and one Carl Duncan as defendants. Duncan did not appear in the action as no service of process was made upon him.

The gravamen of the suit and a basic issue in the court below under the pleadings, interrogatories and evidence in the record pertains to charges of conspiracy made by Paramount against the defendants and also alleged damaging overt acts by defendants in furtherance thereof. There is also in the record a litigated issue concerning an employment agreement between Paramount and defendant Rightmire. The record before us is devoid of findings of fact upon such essential issues in the suit.

This court of appeals has no power *ab initio* to consider under the record before it the issue of conspiracy or the concomitant claim of damages.

The judgment dated February 14, 1948 is therefore vacated and the cause is remanded to the district court for the District of Oregon with direction to reconsider the issues under the record heretofore made during the trial of the action in the district court, to make thereupon specific find-

ings of fact and conclusions of law on the issues of conspiracy and upon the claims of damages, and also upon the employment agreement alleged in Paragraph III(b) of the complaint with defendant Raymond Rightmire; and upon all other crucial issues, and upon so doing to enter final judgment in the action.

Times-Mirror Co. et al. v. National Labor Relations Board, 311 U. S. 789.

[Endorsed]: Opinion. Filed Nov. 16, 1948. Paul P. O'Brien, Clerk.

In the District Court of the United States
For the District of Oregon

Civil No. 3936

PARAMOUNT PEST CONTROL SERVICE,
a corporation,

Plaintiff,

vs.

CHARLES P. BREWER, Individually and doing
business as Brewer's Pest Control, ROSALIE
BREWER, his wife, RAYMOND RIGHT-
MIRE, CARL DUNCAN, EARL HERRIOTT
and all other persons associated with said
defendants as herein described,

Defendants.

MEMORANDUM RESPONDING TO MANDATE
TO MAKE ADDITIONAL FINDINGS

Adopting, as I did, defendants' theory of the case, that there had been a franchise contract, a

modification of it, and breach by plaintiff, it had seemed to me that the findings, as made, negatived the claim of plaintiff that there had been a conspiracy. But, now, pursuant to the Court of Appeals' direction, I am enlarging the findings, and I find specifically that there was not a conspiracy.

Since there was not a conspiracy, but on the contrary what defendants did was a matter of legal right (following plaintiff's repudiation of the franchise contract, as modied), it follows that any damage to plaintiff was occasioned by its own fault and not recoverable from defendants.

Furthermore, as to damages, I find that the evidence on both sides was conflicting and unsatisfactory.

Dated December 24, 1948.

/s/ CLAUDE **McCOLLOCH**
Judge.

Note: I have never understood that a District Judge was expected to make findings on all the issues tendered in a case. It is sufficient if finding is made on a controlling issue or issues. This Circuit so decided several years ago. The opinion was by Judge Beaumont sitting with the Circuit. The case was on appeal from Judge McCormick, and he was affirmed. I don't have the citation handy. [C.M.B.]

[Endorsed]: Filed Dec. 24, 1948.

[Title of District Court and Cause.]

ORDER VACATING JUDGMENT
OF FEBRUARY 14, 1948

On the order and mandate of the United States Court of Appeals for the Ninth Circuit, it is

Ordered that the judgment heretofore rendered in the above-entitled action on the 14th day of February, 1948 be and hereby is vacated.

Dated this 27th day of December, 1948.

/s/ CLAUDE McCOLLOCH
Judge.

[Endorsed]: Filed Dec. 27, 1948.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

Be It Remembered that the above-entitled action came on regularly for trial, the plaintiff appearing by its officers and Robert R. Rankin, F. Leo Smith, and Kenneth C. Gillis, its attorneys, and the defendants Charles P. Brewer, Rosalie Brewer, Raymond Rightmire, and Earl Merriott appearing in person and by Plowden Stott and E. F. Bernard, their attorneys. And the court having heard and considered the evidence and the arguments of counsel and having considered the matter and now being advised makes the following

ADDITIONAL FINDINGS OF FACT

(Pursuant to Direction of the Court of Appeals.)

I.

Plaintiff is a citizen of the State of California and defendants (the word "defendants", unless otherwise indicated, includes Carl Duncan) are all citizens and residents of the State of Oregon and the matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

II.

On the day of July, 1946 plaintiff was organized as a private corporation under the laws of California with its principal office at Oakland, California, authorized to engage in the pest control business. On August 25, 1947, plaintiff qualified to do business in the State of Oregon.

III.

For some time prior to July 1, 1946 the defendant Charles P. Brewer was employed by a partnership known as Paramount Pest Control Service, which partnership was composed of T. C. Sibert and G. W. Fisher, and was engaged in the pest control business. On July 1, 1946 a franchise agreement was entered into between the plaintiff (although not yet incorporated) and the defendant Charles P. Brewer, a copy of which is attached to the plaintiff's complaint as Exhibit No. 1.

IV.

During the month of November, 1946 the plaintiff and the defendant Charles P. Brewer mutually agreed that paragraph numbered V of the franchise

agreement between them—of which Exhibit 1, attached to the complaint, is a copy—should be altered and modified and it was at that time agreed that instead of the agent paying the company twenty percent (20%) of the gross business done by the agent, the net profits of the business, beginning as of the 1st day of July, 1946 and continuing throughout the term of the franchise agreement, should be divided between the plaintiff and the defendant Charles P. Brewer on a 50-50 basis.

V.

The defendant Charles P. Brewer continued the business under the agreement as modified. The defendant Rosalie Brewer was never employed by the plaintiff. The defendant Earl Merriott never signed a contract with the plaintiff. The defendant Raymond Rightmire was employed by the partnership and about July 1, 1946 he was informed by the partnership that he was no longer working for the partnership and that he was working for the defendant Brewer. No written contract was ever made or existed between the plaintiff and the defendant Raymond Rightmire.

VI.

About the 30th day of June, 1947 the plaintiff, in violation of its agreement, repudiated the franchise agreement as modified and notified the defendant Charles P. Brewer that he would thereafter be required to pay the plaintiff twenty percent (20%) of the gross business done by him. Because of such repudiation by the plaintiff of the franchise agreement as modified and for no other reason and not

because of any conspiracy or confederation or agreement among the defendants, the defendant Charles P. Brewer sent in his resignation as agent to be effective August 1, 1947, and because of such repudiation and for no other reason and not because of any conspiracy or confederation or agreement among the defendants said defendant resigned as such agent and went into business for himself under the name and style of Brewer's Pest Control.

VII.

At no time did the defendants or either or any of them combine, or conspire, or confederate, or agree with each other to break or terminate any contracts of employment with the plaintiff or to prevent the performance of any contracts between the plaintiff and its customers or to take over to themselves the plaintiff's business.

VIII.

The plaintiff did not disclose to the defendant Charles P. Brewer or to any of the other defendants any receipts, formulae, or secret processes, and the defendant Charles P. Brewer has not used in his business any receipts, formulae or processes of the plaintiff.

IX.

Since the first day of August, 1947 the defendant Charles P. Brewer has engaged in the pest control business under the name of Brewer's Pest Control. The defendant Raymond Rightmire and the defendant Earl Merriott went to work for Brewer's Pest Control shortly after August 1, 1947. Rosalie Brewer is the wife of Charles P. Brewer. None of

the defendants were hired by Brewer's Pest Control because of any conspiracy or combination between the defendants or any of them and none of the defendants went to work for Brewer's Pest Control because of any conspiracy or combination between the defendants or any of them.

X.

The defendant Rosalie Brewer did not make, execute or acknowledge the Certificate of Assumed Business Name because of any conspiracy or scheme described in the plaintiff's complaint or otherwise, but on the contrary, she made, executed and acknowledged the Certificate of Assumed Business Name for the business convenience of her husband, Charles P. Brewer. The defendant Charles P. Brewer faithfully, diligently and in accordance with his best ability served the plaintiff and used his utmost endeavors to promote the interests of the plaintiff. All contracts for work and service to customers of the plaintiff were taken in the name of the plaintiff. The defendant Charles P. Brewer, as long as he was in the employ of the plaintiff, carried out all obligations on his part to be performed under the franchise agreement. None of the defendants took from the records of the plaintiff the private information of the plaintiff or copies of the names and addresses of customers, and none of the defendants aided the defendant Charles P. Brewer to do any of the things alleged in the plaintiff's complaint to be in violation of the franchise agreement of the defendant Charles P. Brewer. The defendants, other than the defendant Rosalie Brewer, have solicited business from some

of the former customers of the plaintiff, and the defendant Charles P. Brewer has been giving pest control service to some of the former customers of the plaintiff but the solicitation of such customers and the rendering of such pest control service were not pursuant to any conspiracy, combination or agreement alleged in the complaint but the customers were solicited and the services rendered to them in the course of legitimate business competition between the plaintiff and Charles P. Brewer, doing business as Brewer's Pest Control. I am unable to find from the evidence that the defendant Charles P. Brewer is indebted to the plaintiff in any amount or that the defendants are indebted to the plaintiff in any amount.

CONCLUSIONS OF LAW

I.

The franchise agreement between the plaintiff and the defendant Charles P. Brewer is not a valid and binding agreement and has not been a valid and binding agreement since the 1st day of August, 1947.

II.

The defendants are not guilty of a conspiracy, as alleged in the plaintiff's complaint, or otherwise and none of the acts done by the defendants were pursuant to or in furtherance of any conspiracy.

III.

The plaintiff is not entitled to any injunctive relief against the defendants or any of them and is not entitled to a judgment for any sum.

IV.

The defendants Charles P. Brewer, individually and doing business as Brewer's Pest Control, Rosalie Brewer, Raymond Rightmire, and Earl Merriott are entitled to a judgment denying the plaintiff an injunction and dismissing the complaint. Costs to neither party.

Done and dated this 23rd day of December, 1948.

/s/ CLAUDE McCOLLOCH
Judge.

[Endorsed]: Filed Dec. 23, 1948.

In the District Court of the United States
For the District of Oregon

No. Civil 3936

PARAMOUNT PEST CONTROL SERVICE,
a corporation,

Plaintiff,

vs.

CHARLES P. BREWER, individually and doing business as Brewer's Pest Control, ROSALIE BREWER, his wife, RAYMOND RIGHTMIRE, CARL DUNCAN, EARL MERRIOTT and all other persons associated with said defendants as herein described,

Defendants.

JUDGMENT

Be It Remembered That the above-entitled cause came on regularly for trial on the 20th day of January, 1948, the plaintiff appearing by its officers

and Robert R. Rankin, F. Leo Smith and Kenneth C. Gillis, its attorneys, and the defendants Charles P. Brewer, Rosalie Brewer, Raymond Rightmire and Earl Merriott appearing by Plowden Stott and E. F. Bernard, their attorneys. And pursuant to the order and mandate of the United States Court of Appeals for the Ninth Circuit, the court having now reconsidered the issues under the record heretofore made during the trial of the action and having made and signed specific and further Findings of Fact and Conclusions of Law in accordance with such order and mandate, it is

Ordered and Adjudged that an injunction against the defendants be and hereby is denied. It is further

Ordered and Adjudged that the plaintiff take nothing against the defendants or either or any of them and that the complaint be dismissed without costs to any party.

Dated this 27th day of December, 1948.

/s/ CLAUDE McCOLLOCH
Judge.

[Endorsed]: Filed Dec. 27, 1948.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Paramount Pest Control Service, a corporation, plaintiff above-named, hereby appeals to the United States Court of

Appeals for the Ninth Circuit, from the final judgment entered in this action on December 27, 1948, and the whole thereof.

Dated this 17th day of January, 1949.

/s/ KENNETH C. GILLIS,

/s/ ROBERT R. RANKIN,

/s/ GEORGE E. BIRNIE,

Attorneys for Appellant, Paramount Pest Control Service, a corporation.

[Endorsed]: Filed Jan. 17, 1948.

[Title of District Court and Cause.]

POINTS ON WHICH APPELLANT INTENDS
TO RELY

Appellant cites the following points upon which it intends to rely for reversal of the judgment of the District Court of the United States for the District of Oregon, Honorable Claude McColloch, Judge, and claims said trial court erred as follows:

1. Failing to find that the appellant was engaged in Oregon in the business described in its complaint and denied in the answer.

Supporting Record: Complaint, Answer, testimony of T. C. Sibert, E. W. Bushing, C. Wendell Fisher, DeGray Brooks, and Exhibits 1, 2, 3 and 4.

2. Finding, as set forth in its Findings, and particularly Finding No. VI, that plaintiff had violated its agreement and repudiated the franchise agreement.

Supporting Record: Testimony of T. C. Sibert, Harold Hilts and Mrs. Brewer (Tr. of Record 162), Exhibits 30, 31, 32, 33, 34, 35, 36, 37, 38, 39.

3. Failing to find that defendant Brewer had repudiated the contract known as the franchise and failed to give the necessary ninety day notice required therein.

Supporting Record: Testimony of T. C. Sibert, Harold Hilts, Exhibit 42, testimony of Mrs. Brewer.

4. Finding that the defendants had not conspired, as alleged in the complaint, as shown particularly by Findings VII, IX and X, when the evidence definitely showed a conspiracy.

Supporting Record: Testimony of DeGray Brooks, C. W. Fisher, Glenn H. Fisher, Harold Hilts, T. C. Sibert, Allard J. Conger, Exhibits 27, 42, 46, 47, 48, 49, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75.

5. Failing to find there were damaging overt acts.

Supporting Record: Testimony of C. W. Fisher, DeGray Brooks, Harold Hilts, and answers to interrogatories by the defendants, particularly Charles P. Brewer in disclosing some one hundred and forty-two accounts which he procured and were formerly served by plaintiff. (Vol. I, Tr. of Record, pp. 45 to 57.)

6. Failing to find a monetary judgment in favor of the plaintiff, but denying monetary judgment as shown in Finding X and Conclusion III, and in not finding

(a) that defendant Brewer was indebted on contract obligations;

Supporting Record: Testimony of T. C. Sibert and Harold Hilts and Exhibits 36, 37, 38, 56, 39, 51, 51(a); and

(b) against all defendants in damages;

Supporting Record: Testimony of T. C. Sibert, Harold Hilts, DeGray Brooks, C. W. Fisher and Exhibits 53, 54, 55.

7. Refusing to enjoin the defendants from said conspiracy, as above described, and from engaging in business for a period of three years, as described in the Brewer and Rightmire contracts.

Supporting Record: Testimony of T. C. Sibert and Harold Hilts, answer to interrogatories by the defendants, Transcript of Record pages 45 to 57, inclusive, Exhibit 1, Tr. of Record p. 12.

8. In failing to find and conclude costs in favor of appellant.

Dated this 17th day of January, 1949.

/s/ KENNETH C. GILLIS,

/s/ ROBERT P. RANKIN,

/s/ GEORGE E. BIRNIE,

Attorneys for Appellant.

(Acknowledgment of Service.)

[Endorsed]: Filed Jan. 17, 1949.

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF RECORD

On the original appeal in this case, both appellant and appellees designated a record on appeal and that record has been printed by the Clerk of the Circuit Court of Appeals and filed herein.

The United States Court of Appeals for the Ninth Circuit on November 16, 1948, required of the District Court additional findings and a judgment based thereon.

Appellant, pursuant to this additional procedure, now designates this record for appeal:

1. The record heretofore designated and printed and filed herein. (Now in San Francisco.)
2. Memorandum of the District Judge for the District of Oregon, dated December 24, 1948, responding to mandate to make additional findings.
3. Order of December 27, 1948, vacating Judgment of February 14, 1948.
4. Findings of Fact and Conclusions of Law filed herein December 23, 1948.
5. The final judgment signed and filed December 27, 1948.
6. This Designation of Record.
7. Points on which Appellant intends to rely.

Dated this 17th day of January, 1949.

/s/ ROBERT R. RANKIN,
Of Attorneys for Plaintiff-Appellant.

(Acknowledgment of Service.)

[Endorsed]: Filed Jan. 17, 1948.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing documents consisting of memorandum of Judge McColloch, order vacating judgment of February 14, 1948, findings of fact and conclusions of law, judgment, notice of appeal, bond on appeal, points on which appellant will rely, designation of record on appeal, and transcript of docket entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 3936, in which Paramount Pest Control Service, a corporation, is Plaintiff and Appellant, and Charles P. Brewer, et al, are defendants and appellees; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that the cost of preparing the within transcript is 60 cents, and the cost of filing the notice of appeal is \$5.00, making a total cost of \$5.60, and that the same has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this January 28th, 1949.

(Seal)

LOWELL MUNDORFF,
Clerk.

[Endorsed]: No. 12170. United States Court of Appeals for the Ninth Circuit. Paramount Pest Control Service, a corporation, Appellant, vs. Charles P. Brewer, individually and doing business as Brewer's Pest Control, Rosalie Brewer, his wife, Raymond Rightmire, Carl Duncan and Earl Merriott, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed January 31, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12170

PARAMOUNT PEST CONTROL SERVICE,
a corporation,

Appellant,

vs.

CHARLES P. BREWER, individually and doing
business as BREWER'S PEST CONTROL,
et al,

Appellees.

STATEMENT OF THE POINTS ON WHICH
APPELLANT INTENDS TO RELY ON
APPEAL

1. Appellant adopts in full the points on which he intends to rely as specified in the record on file with the above-entitled court.

DESIGNATION OF PARTS OF RECORD
TO BE PRINTED

2. Appellant designates the following parts of the record to be printed, namely: (1) Memorandum of the District Judge for the District of Oregon, dated December 24, 1948, responding to mandate to make additional findings. (2) Order of December 27, 1948, vacating Judgment of February 14, 1948. (3) Findings of Fact and Conclusions of Law filed herein December 23, 1948. (4) The final judgment signed and filed December 27, 1948. (5) This Designation of Record. (6) Points on which Appellant intends to rely. (7) Appellant requests that the Transcript on appeal heretofore filed in this matter in appeal No. 11892 be adopted as part of the Transcript on this appeal now pending. (8) The Order of this Court relieving Appellant from printing or reproducing Exhibits and permitting them to be considered in their original form.

Dated this 2nd day of February, 1949.

/s/ ROBERT R. RANKIN,

/s/ KENNETH C. GILLIS,

Attorneys for Appellant.

(Affidavit of Service by Mail.)

[Endorsed]: Filed February 7, 1949. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

ORDER RELIEVING APPELLANT FROM
PRINTING OR REPRODUCING EXHIBITS

On the application of Paramount Pest Control Service, a corporation, Appellant in the above-entitled matter, and the affidavit of Kenneth C. Gillis supporting said application, and good cause appearing therefor:

It Is Hereby Ordered that Appellant, Paramount Pest Control Service, a corporation, be and it is hereby relieved from printing or reproducing the Exhibits to be used on Appeal in the above-entitled matter and that said Exhibits shall be used in their original form.

Dated February 4, 1949.

So ordered:

/s/ WILLIAM DENMAN,
Chief Judge.

/s/ HOMER T. BONE,
United States Circuit Judge.

[Endorsed]: Filed February 7, 1949. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

ORDER BASED ON STIPULATION
OF PARTIES

On Stipulation executed by the Attorneys for the respective parties hereto, and good cause appearing therefore:

It is hereby Ordered that the two volumes of the Transcript of Record and all the exhibits previously transmitted from the District Court of Oregon and printed and filed in the Circuit Court of Appeals for the Ninth Circuit as Appeal No. 11892, including briefs of both parties, pleadings and orders concerning the record, be and the same are to be considered as filed of record on this appeal and constitute part of the record upon which the present appeal is based on that reference may be made in this appeal to any of the records in the previous appeal and that the printing of the record in Appeal No. 11892 in this Appeal No. 12170 is not required. Both parties have the privilege of filing additional briefs.

Dated February 12, 1949.

So Ordered:

/s/ WILLIAM DENMAN,
Chief Judge.

/s/ CLIFTON MATHEWS,

/s/ HOMER T. BONE,

United States Circuit Judges.

[Endorsed]: Filed February 14, 1949. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

STIPULATION

It is hereby stipulated and agreed between Appellant and Respondents, through their respective attorneys, that the two volumes of the Transcript of Record and all of the exhibits previously transmitted from the District Court of Oregon and printed and filed in the United States Court of Appeals for the Ninth Circuit as Appeal No. 11892, including briefs of both parties, pleadings and orders concerning the record, be and the same are to be considered as filed of record on this appeal and constitute part of the record upon which the present appeal is based and that reference may be made in this appeal to any of the records in the previous appeal and that the printing of the record in Appeal No. 11892 in this appeal No. 12170 is not required. Both parties have the privilege of filing additional briefs.

/s/ KENNETH C. GILLIS,

/s/ ROBERT R. RANKIN,

Attorneys for Appellant.

/s/ EARL F. BERNARD,

/s/ PLOWDEN STOTT,

Attorneys for Appellees.

[Endorsed]: Filed February 14, 1949. Paul P. O'Brien, Clerk.



In the United States
COURT OF APPEALS
for the Ninth Circuit

PARAMOUNT PEST CONTROL SERVICE, a
Corporation,

Appellant,

vs.

CHARLES P. BREWER, individually and doing
business as Brewer's Pest Control, ROSALIE
BREWER, his wife, RAYMOND RIGHT-
MIRE, CARL DUNCAN, and EARL MER-
RIOTT,

Appellees.

Upon Appeal from the District Court of the United
States for the District of Oregon.

APPELLANT'S OPENING BRIEF
(Second Appeal)

FILES

MAR 16 1949

PAUL P. O'BRIEN,
CLERK

KENNETH C. GILLIS,
1103 Central Bank Building,
Oakland 12, California,

ROBERT R. RANKIN,
710 Yeon Building,
Portland 4, Oregon,
Attorneys for Appellant.

SUBJECT INDEX

	Page
Jurisdiction	1
Statement of Case	2
Questions Involved and How Raised	3
I. Paramount's Authorized Business in Oregon.....	3
II. Did Paramount repudiate, as Charles P. Brewer alleges	3
A. What Franchise was in effect	4
1. The Franchise	4
2. Admissions	4
3. Modification	5
(a) Time when modified	5
(b) Terms of Modification	5
(i) Mr. T. C. Sibert's Claim	5
(ii) Mr. Brewer's Claim	6
(c) Duration of Modification	8
First Period	8
Second Period (1st Extension)	9
Third Period (2nd Extension)	9
(d) Conduct of Parties under Modification	10
(i) July 1 to Dec. 31, 1946	10
(ii) Jan 1, 1947 to March 15, 1947	11
(iii) March 15, 1947	11
(iv) Accountings	12
(e) Termination of Modification	15
4. Final Period of Reinstated Franchise	17
(a) Testimony of Reinstatement	17
(b) Circumstances showing Reinstatement (Six in number)	18
5. Conclusions	22
B. No Repudiation by Paramount	23

SUBJECT INDEX (Cont.)

	Page
III. Repudiation by Charles P. Brewer	24
IV. Appellees' Conspiracy	25
1. Reference to Opening Brief	25
2. Inconsistent Positions of District Court	25
3. Three Avenues of Appellees' Liability men- tioned next	26
4. Proof of Conspiracy as alleged	27
5. Proof of Conspiracy, franchise omitted	31
6. Individual Liability	35
V. Damaging Overt Acts	35
VI. Appellant's Claimed Relief	36
A. For an Injunction	36
B. Monetary Compensation	36
(1) On Contract from Brewer	36, 38
(2) On Tort from Appellees	39
VII. Costs	40

TABLE OF AUTHORITIES

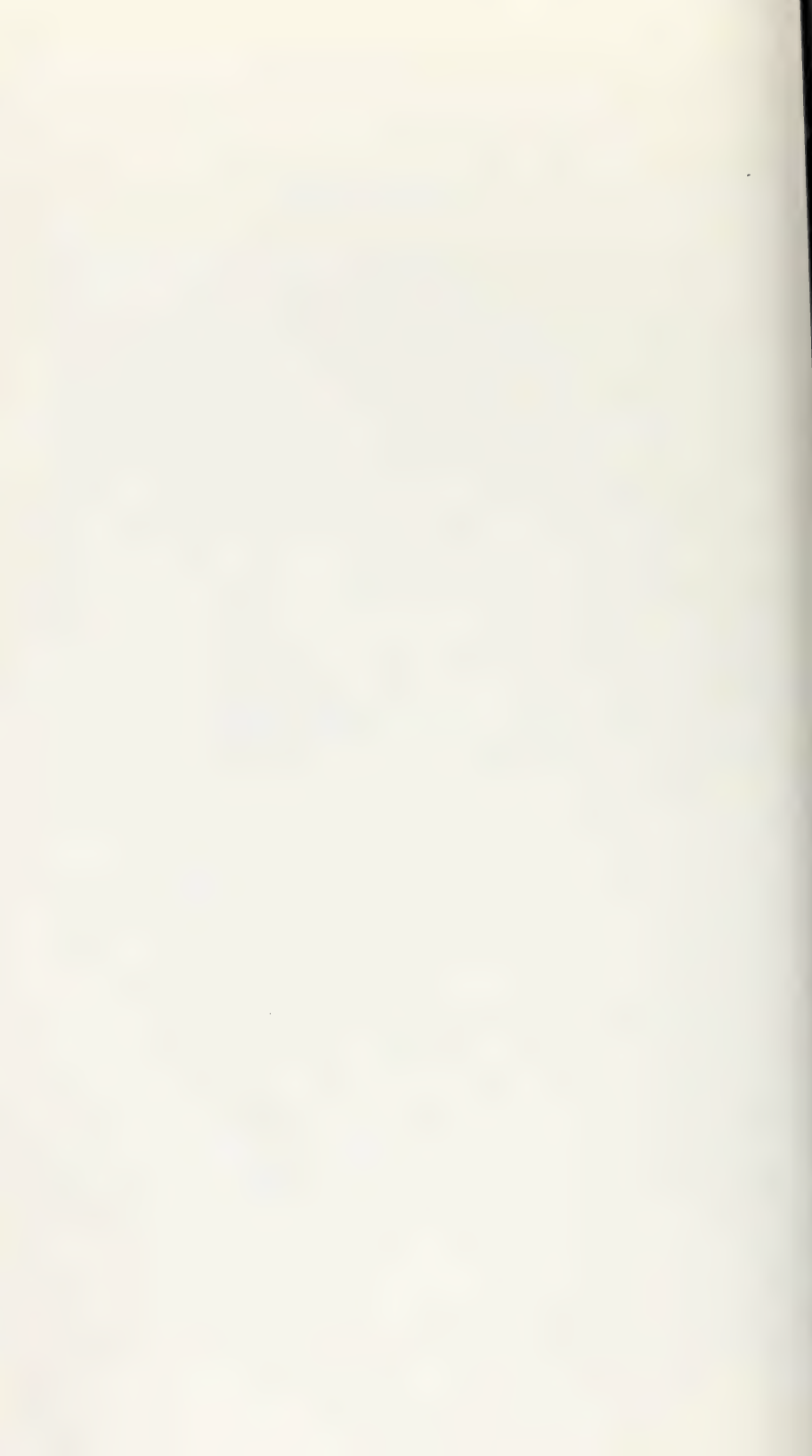
	Page
Angle v. Chicago, St. Paul, Minneapolis & Omaha Ry. (1893) 151 U.S. 1	33
Aughey v. Windram (1908) 137 Ia. 315, 114 N. W. 1047	39
Baker v. Seawear (1912) 63 Or. 350, 127 P. 961	22
Barden Cream & Milk Co. v. Mooney et al (1940) 305 Mass. 545, 26 N. E. (2d) 324	34
Bauer v. Northwest Blow Pipe Co. (1915) 75 Or. 1, 146 P. 129	22
Blackfeet Livestock Co. v. N. W. National Bank (1931) 138 Or. 530, 5 P. (2d) 702	22
Brooks v. Scoutle (1932) 81 Utah 163, 17 Pd (2d) 218	26
Finney v. Stanfield Fraternal Ass'n. (1929) 131 Or. 393, 283 P. 415	22
Flat Hots Co. v. Peschke Packing Co., 301 Mich. 337, 3 N. W. (2d) 295	24
Gabriel v. Collier (1934) 146 Or. 247, 29 P. (2d) 1025	39
Gold Mining & Water Co. v. Swinerton et al (1943) 23 Cal. (2d) 19, 142 P. (2d) 22	24
G. M. Goldberg Enterprises (1927) 225 N.Y.S. 513, 130 Misc. 887.	26
Iron Molders Union v. Allis-Chalmers Co. (C.C.A. 7th 1908) 166 Fed. 45	34
Jones v. Baker (1927) 7 Cowen N. Y. 4448	33
Jones v. Marshall-Wells Co. (1922) 104 Or. 388, 208 P. 768	22
Keller v. Commercial Credit Co. (1935) 149 Or. 372, 40 P. (2d) 1018	39

TABLE OF AUTHORITIES

	Page
Longshore Printing Co. v. Howell (1894) 26 Or. 527, 38 P. 547	34
Lewis Invisable Stitch Machine Co. v. Columbia Blind Stitch Machine Mfg. Corp'n. (C.C.A. N.Y. 2d) 80 Fed. (2d) 862	35
Neppach v. Oregon & California Railway Co. (1905) 46 Or. 374, 80 P. 482	22
Northern Kentucky Tel. Co. v. Southern Bell Tele- phone & Telegraph Co. (1930) 1 Fed. Supp. 576; affirmed C.C.A. 73 Fed. (2d) 333; 97 A. L. R. 133 cert. denied 294 U.S. 719, 79 L. Ed. 1251	36
Pacific Livestock Co. v. Portland Lumber Co. (1920) 96 Or. 567, 189 P. 893	22
Ranson v. Dollor S.S. Co. (D.C. Wash. 1933) 2 Fed. Supp. 409	33
Rehart v. Klossner (1941) 48 Cal. App. (2d) 46, 119 P. (2d) 148, 150	25
Reid v. Alaska Packing Co. (1905) 47 Or. 215, 83 P. 139	22
Roemhild v. Home Insurance Co. et al (1929) 130 Or. 50; 278 P. 87	22
Rouse v. Equitable Savings & Loan Ass'n. (1935) 151 Or. 427, 50 P. (2d) 763	39
Truax v. Corrigan (1921) 257 U.S. 312, 66 L. Ed. 259	33
U. S. v. Pan-American Petroleum Co. (C.C.A. 9th 1932) 55 Fed. (2d) 753	30

COMPILATIONS

	Page
11 Am. Jur. "Conspiracy" §45, p. 577	37, 39
11 Am. Jur. "Conspiracy" p. 582	33
84 A. L. R. p. 48, Note 84	33
152 A.L.R. 1147	38, 39
12 C.J. p. 583, §102	31
12 C.J. p. 584, §104	39
12 C. J. 589-615, "Conspiracy"	38
13 C. J. "Contracts" §727, p. 654	25
15 C.J.S. pp. 996-7	32
15 C.J.S. p. 1021, §13	33
Federal Rules Civil Procedure—Rule 54(d)	40
1 O.C.L.A. §2-1001 (3)	2



In the United States
COURT OF APPEALS
for the Ninth Circuit

PARAMOUNT PEST CONTROL SERVICE, a
Corporation,

Appellant,

vs.

CHARLES P. BREWER, individually and doing
business as Brewer's Pest Control, ROSALIE
BREWER, his wife, RAYMOND RIGHT-
MIRE, CARL DUNCAN, and EARL MER-
RIOTT,

Appellees.

Upon Appeal from the District Court of the United
States for the District of Oregon.

APPELLANT'S OPENING BRIEF
(Second Appeal)

JURISDICTION

On the record already on file herein, this Court has determined that the District Court of Oregon and this Court of Appeals have jurisdiction (540). On November 16, 1948, this Court ordered a vacation of the judgment previously entered by the District Court of Oregon

and directed a reconsideration, findings and conclusions upon crucial issues, and the entrance of a final judgment (541-2).

The record shows no new evidence was taken and the parties prepared their respective proposed findings, conclusions and judgments and these were submitted to the Court upon the record to which was added briefs filed herein by the parties.

The District Court then entered its second set of findings and conclusions (544-550) upon which it based its final judgment (550-1), adhering to its previous disposition of the case, and from such judgment this appeal is perfected (551-561).

STATEMENT OF CASE

Appellant Paramount Pest Control Service, herein called "Paramount", refers to its previous "Statement of the Case" (Ap't. Br. 2-6, Reply Br. 2-4) gleaned from the entire record, and incorporates it here as such statement.

Paramount is constrained to call to the Court's attention that appellees' "Statement of Case" (Ap'e. Br. 2-4) is predicated solely upon Mr. Brewer's testimony directly, or indirectly by reference to court findings based thereon. Charles P. Brewer's unsupported evidence is to be viewed with distrust. (*O.C.L.A.* §2-1001 (3)). His testimony of the date when he intended to go into business for himself (289, 310, 319, 499, 501, particularly 312) and his alleged purchase of important

merchandise—poison (294-7) are definitely impeached by the testimony of two disinterested witnesses and records (323-331, 331-338; Ex. 46-48, inc. and 64-75, inc.). Other specific instances are cited in the body of the brief. This is important when the Court is to decide issues dependent upon the credibility of witnesses.

QUESTIONS INVOLVED AND HOW RAISED

I. Is Paramount engaged in Oregon in the same business it is authorized to do by its California Charter?

This issue is created by allegations in Paragraph II(b) of the complaint (4)—(pages without other designation refer to Transcript of Record), denied by Paragraph 2 of the first defense in the answer (68).

It is fully argued in the opening brief (6-7), never answered in appellees' brief and Paramount presumes it admitted. It is important in defining the business sought to be protected by injunction.

II. Did Paramount repudiate its agreement with Charles P. Brewer?

The second defense in Mr. Brewer's answer alleges his franchise was modified, and, as modified, was repudiated (70).

The District Court adopts this theory and predicates

its findings and conclusions thereon and denies both injunctive and monetary relief (550-1).

Appellant pursues this question with much detailed reference to the record because the District Court declared this issue involved the "key question of credibility" (263) and because appellant believes that appellees consider this their only point on appeal.

Of necessity the general question divides itself into two parts: (A) What was the agreement or franchise in effect with Charles P. Brewer at the time of the alleged repudiation; and (B) did Paramount repudiate that particular franchise?

A. (1) THE FRANCHISE: The original "Sales Agent's Agreement" is for brevity called a "franchise"; it is attached to the complaint as Exhibit 1(29-40); the original was put in evidence as Exhibit 27, dated July 1, 1946, admitted by Mr. Brewer to be genuine (45), that he signed it and it was a binding and valid contract and so continued up to its modification (471).

(2) FURTHER ADMISSIONS: Both parties admit the franchise was modified verbally (146, 472) on terms originally agreed to solely by Messrs. Sibert and Brewer and confined solely to Paragraph 5 of the franchise (8-10, 31, 68, 146, 210) and at that time made retroactive to its inception, July 1, 1946 (147, 475). There is neither claim nor evidence that any other section or term of the franchise was modified. Appellees have repeatedly tried to get the District Court to decide this franchise is "not fair and reasonable" (76), but such defense was not pled (67-71), no issue made nor evi-

dence admitted thereon, and the District Court has repeatedly refused to so conclude (76) (549). (The original pleading shows the second paragraph under "Conclusions" which declared the franchise neither fair nor reasonable, was stricken.) No appeal was taken from the Court's refusal, and the franchise is left as fair and reasonable. Appellees' counterclaim (70-71) was never allowed by the Court and no appeal is taken and there is no issue before this Court.

(3) THE MODIFICATION: The time of concurrence, terms and duration of the modification are in issue and the testimony thereon in conflict. Surrounding circumstances are considered to determine the issue and each party has the burden of establishing their respective claims thereon.

(a) TIME MODIFICATION WAS MADE: There were only the two witnesses present. Mr. Sibert claims modification occurred on September 12, 1946 (146), and according to indefinite Mr. Brewer, it was "a binding contract" until "shortly after the first of the year 1947—between the first of February and March" (471). At another time he says it was modified at "Thanksgiving in November 1946" (277, 472).

(b) TERMS OF MODIFICATION: *Mr. Sibert* testifies that while they were friendly, in the breakfast room of Mr. Brewer's home in Portland, Oregon, Mr. Brewer described an expansion program that he could not afford to finance, but if he could expand he could sign up enough business to bring the present business up to \$3,000 monthly. They then agreed that for every dollar

Mr. Brewer took for himself, he would pay Paramount a like sum, and the surplus returns would be used by Brewer for the expansion of the business (147). There is no variation by Mr. Sibert from this position (154).

Mr. Brewer testifies that Paramount's business was in the red (untrue, 226-7) and he did not want it because it would break him (474) so he and his wife drove to the office of the corporation in Oakland, California, and told Mr. Sibert he could not carry the business any longer or financially handle it, so Messrs. Brewer and Sibert agreed " * * * to make it 50% of the net profit" (475). Mr. Sibert says such an agreement was never made (148).

The difference between the two positions is this: Under Paramount's contract all profits over and above expenses and an equal division of compensation between Paramount and Mr. Brewer, would go into payment for the joint plan of expansion.

Under Mr. Brewer's present contention, there was no allotment of money to the expansion program because after the running expenses were paid, the profits were divided between Paramount and Brewer. Mr. Brewer's present contention ignores entirely the reason for going on the plan of matching Brewer's dollar-for-personal-use with Paramount's dollar and putting all the balance, whether included in current expenses or profits, into the joint expansion program.

Mr. Brewer's terms are not only incomplete, but often inconsistent. He is asked and answered as follows: "Q. I will ask you if he (Sibert) said that 'when you

take a dollar out of the business, I will take a dollar out of the business'? A. He said the words 'when you take home a dollar I take home a dollar.' " (475).

When Mr. Brewer was further pressed, he endeavored to put his interpretation on the agreement, but contrary to the statements he says were made: "Q. Was it not finally agreed between you and Ted Sibert that when you took a dollar out of the business he would take a dollar out of the business? A. Not in that exact category, no. It was understood to be 50% of the net profits equally. I couldn't pay him a dollar for dollar because the business was in the red and I was living out of my personal income as it was." (475-6) (307).

At another time Brewer was indefinite as to terms and said that the franchise "* * * would be a 50-50 proposition, even on the net profits—I don't remember the word 'net profits' used—but it was a 50-50 proposition and that they would change it over to that." (277).

On another occasion he admits he was going to put back into the business whatever he did not need for himself and Paramount (308). If Mr. Brewer is relying on a modification, he should know whether his percentage was based on "net profits," or some other formula. He testifies he does not remember. Mr. Brewer was asked if he had discussed the September 1946 modification with Mr. Hilts "at all" (278), and Brewer replied in the negative and then immediately said: "The only time anything was said about it whatsoever was when Mr. Hilts pulled up an audit statement from the books—pulled an audit statement from the books—round

September 13th or 14th, and presented it to me.” (278). According to this testimony, the modification was discussed the day after Mr. Sibert says he made the modification agreement with Mr. Brewer (146-7, 278).

After discussing the September 1946 incident, as above, Mr. Brewer testified that from September until sometime in March 1947 everything went along satisfactorily (278). Contradicting that statement, he later testified how in November he was so disgusted with the business, he drove to California to force the modification (474-5) and in place of discussing this alleged important modification at this time, Mr. and Mrs. Brewer stayed at Mr. and Mrs. Sibert’s Oakland home “to visit and relax” for ten days and the feeling was “very close”; they had a “good time”; “no disturbance whatever,” with little mention of business and such limited to “expansion” and discussing “men” in Brewer’s employ; it was confined to “little short talks”; he came only to the office “to pick up chemicals to bring back” to Portland (148-9).

(c) DURATION OF MODIFICATION: *Mr. Sibert* testifies that he and Mr. Brewer agreed and they acted upon that agreement that the modification would go back to July 1, 1946, and would end on December 31, 1946 (147, 155). After the December date had expired, two extensions of the dollar-for-Paramount-dollar-for-Brewer-home agreement was made at the following times and for the following reasons and periods:—

The first period was of course from July 1 to December 31, 1946.

The second period was from January 1, 1947 to March, 1947, and was under the first extension granted.

In March, 1947, because of the parties' agreement regarding the development of the Eastern Oregon territory (151) and the expense and loss of this joint undertaking (150, 155, 224; Ex. 51-A; Ex. 53), Paramount extended the dollar-for-dollar agreement from January to March, 1947, in spite of the fact that in January Mr. Brewer was back on Section 5 of the franchise (31, 155) and made payments on the franchise, as hereinafter discussed. The reversion to the dollar-for-dollar arrangement was made without Mr. Brewer's solicitation, without his presence or concurrent agreement and out of a sense of fairness and cooperation (155-6, 182, 256). He was notified of it by Hilt's letter of March 15, 1947 (Ex. 29; 156, 157) which was written after Hilt's return to Oakland and discussed with Mr. Sibert the loss occasioned by the Brewer-Paramount Eastern Oregon venture (Ex. 29; 224).

The third period involving the second extension occurred on June 17-20, 1947, when, in a friendly conference (160), Paramount again extended the dollar-for-dollar agreement, "to the end of the fiscal year" (June 30, 1947) (161, 238) because Mr. Brewer requested it (237, 261).

Mr. Brewer testifies that Mr. Sibert, at the time they were talking of this extension, asked him, "Do you want this until the first of the year or do you want it for a year or two or how do you want it? It is up to you", to which Mr. Brewer replied, according to his testimony,

"I want it for the life of the contract, as long as we are operating" to which Mr. Sibert agreed (475). Mr. Sibert denies this (147).

(d) CONDUCT OF THE PARTIES UNDER THE FRANCHISE: The testimony of the parties is in diametric conflict. The matter of credibility is involved, as was previously indicated (p. 2 *supra*).

It is relevant and material to examine the conduct of the parties to determine whether Mr. Brewer is correct in his claim that the modification was to last for the duration of the franchise or whether Mr. Sibert is correct in claiming that their modification agreement was reiterated from time to time for reasons given and that the modification terminated and the franchise was renewed and in effect at the time Brewer terminated his relationship with the company.

This conduct of the parties, interpreting what the real agreement was, necessitates much detail.

(i) If the extension was not made for the period of the contract but ended on December 31, 1946, it is relevant to know what was the conduct of the parties subsequent to December 31, 1946. There was no balancing of the books in January (478) and Mr. Brewer made no payments on the franchise in January of 1947. He had paid nothing on the 1946 franchise indebtedness to Paramount during the year (225). The first conduct by either party was in February of 1947. With an indebtedness due by Brewer to Paramount running from July 1, 1946 through January, 1947, it is reasonable to presume that Paramount was making demand for some remit-

tance, as indicated in Rosalie Brewer's note to Hilts on February 6, 1947 (Ex. 81; 450). In this letter Mrs. Brewer said that she was "sending \$250.00 on the franchise" and that she wished "it was more, but no can do" (450). The check mentioned in her letter was dated February 6, 1947, for \$338.00 from Brewer (Ex. 30), signed by Mrs. Brewer who had authority to sign checks (454) to Paramount with the supporting voucher (Ex. 31). This sum of \$338.00 covered a payment of \$88.00 on expenses not involved here (215) and the additional sum of \$250.00 "for franchise" (Ex. 31). This payment was made without special billing by Paramount (215, 304), so the expression "for franchise" was of Brewer's own determination, put on by Brewer "of his own free will" (216). It did not refer in any manner to a franchise as modified. It is a logical conclusion to say that Mr. Brewer knew he was back on the original franchise.

(ii) Mr. Brewer cannot argue the expression "for franchise" was inadvertently used because it was used twice again, making four times in all (Ex. 31, 33, 35, 81). He made a payment on March 6, 1947, in the amount of \$250.00 (Ex. 32) and again Mr. Brewer designated the payment to "apply on 1946 franchise" (Ex. 33). He did not designate that the payment was on any modification or profit sharing basis. The original franchise is dated 1946 (29) and the entire payment applied solely to "franchise" (216).

(iii) A third payment was made by Brewer on March 13, 1947, to Secretary Hilts for Paramount in the sum of \$494.25 (Ex. 34) as a balance on the franchise for January and February, 1947 (Ex. 35, 58; 490-1).

It is of compelling significance that the sum of these payments, amounting to \$994.25, is the exact sum which totaled the Brewer debt to Paramount under the unmodified franchise for January and February, 1947 (216-7).

(iv) Exhibit 57 is a profit and loss statement from January 1st through February 28, 1947. These figures were taken from Mr. Brewer's books in Portland and show all the expenses of the office which were paid by him for those months and show \$519.80 due in January and \$474.45 due in February, and these amounts total \$994.25 and can be reconciled only on the basis of the original franchise. On this accounting appears \$250.00 as the above payment on franchise and there is no written protest to this accounting.

The above described third payment was included in the profit and loss statement (Ex. 58) which ran from January 1st through March 31, 1947, under the voluntary agreement of Paramount to extend the dollar-for-dollar basis in view of the loss on the Eastern Oregon business venture. This Exhibit 58 has a list of the expenses of the Portland office paid by Brewer wherein there is also listed the \$994.25 paid on franchise.

There are other profit and loss statements rendered in consideration of the extension of this modified franchise by Paramount and these records are described as follows:

Exhibit 59(a) is a profit and loss statement from January 1st through April 30, 1947, and shows the expenses of this business, all paid by Mr. Brewer as re-

quired under his franchise. Exhibits 60 and 61(a) show the balance due June 30, 1947, and the latter is a profit and loss statement from January 1st to June 30, 1947, showing expenses paid by Mr. Brewer in furtherance of the franchise obligation. Then these statements are all consolidated in a final statement which is in chronological but not in numerical order and known as Exhibit 36, which is a pencil statement that Messrs. Hilts and Brewer made out on July 9, 1947, covering the entire period of July 1, 1946, to June 30, 1947, and shows that Brewer owed the company \$3,359.61 of which he paid on July 9th the sum of \$259.61. On this settlement he was given credit for one-half of the \$994.25 which was due under the original franchise, as shown in Exhibit 58 (216, 217). This also shows a net balance of \$497.12 which was previously paid by Brewer (Ex. 34 and 35) on the original franchise for January and February. This is a statement of what is exactly on his books on June 30, 1947, and the endorsement of \$259.61 is in Brewer's own handwriting (310). Mr. Brewer made no objections, but did make a voluntary payment (212, 257) and he so expressly admits (303).

None of these three payments can be reconciled with Mr. Brewer's claim that they were made on a division of profits agreement (217, 279). Mr. Brewer noted in the voucher for the last payment that it was for "franchise balance for January and February" (Ex. 35; 217, 218) and also referred to the two previous payments. This is an exact remittance (even to the cents) due on the 20-80% unmodified franchise and was freely made (217), with "everybody happy" (218). Mr. Brewer

erroneously claims that the total amount was in one check (279). At another time he erroneously claims the second payment was upon the profit dividing basis (304), but admits that he cannot reconcile these payments with any divided profits basis and then claims he made the checks for money that he did not owe (305). The above figures in these exhibits are from Mr. Brewer's books kept by Mr. and Mrs. Brewer and gone over with and understood by Mr. Brewer (219). The accounting of March 13, 1947 (217) was made and a copy thereof for the months of January and February, 1947 (Ex. 57) mailed to Mr. Brewer (220), and appears on the records of both parties (221). The money so paid by Mr. Brewer on his franchise was adjusted to apply on the unsolicited dollar-for-dollar basis and this is detailed by Mr. Hilts (225-6) and was done at Mr. Brewer's request to keep him going (224). Involved in this accounting are Exhibits 29, which is Mr. Hilts' letter of March 15, 1947, and Exhibit 57. From the testimony it appears that \$1,016.55 was the net profit Mr. Brewer made for January and February (223); \$512.22 was the amount Mr. Brewer drew for these two months, so this constituted his franchise for January and February, 1947. He had actually paid the company under the old franchise \$994.25 (Exhibits 30, 32 and 34) and accountings (Ex. 57, 58 and 58(a)). Under Brewer's profit sharing claim there was due but \$512.22 which is the amount he drew, and under Paramount's modified agreement he overpaid the company \$482.03. This was credited on the \$1,479.65 which was due to the corporation for the period from July 1st to December 31, 1946,

under the modified franchise and upon which Brewer had paid nothing (223-227). Taking the overpayment of \$482.03 from the July-December debt of \$1,479.65, left a balance of \$997.62 owing the company as of December 31, 1946. All of this shows a consistent dealing on the original franchise basis, with subsequent adjustments by Paramount in a spirit of cooperation to assist and keep Brewer satisfied (224).

He admits the final payment of \$494.25 was made as the balance on a billing which was based on the original unmodified franchise agreement (490). He attempts to explain this payment by claiming he "owed them at least \$494.00" (490). This does not relieve him of the effect of his endorsement on the check when the amount of the payment can be reconciled only with the original franchise and not on a division of profits basis (490).

(e) **TERMINATION OF MODIFICATION:** Mr. Brewer admits that before July 1, 1947, Mr. Sibert told him they would be back on the original franchise on said date (284). The modification did terminate June 30, 1947, and Mr. Brewer did go back on the original franchise, including Paragraph 5 (161). The original modification and its extensions ran from July 1, 1946, to June 30, 1947, encompassing the fiscal year (238). The return to the original franchise was at Mr. Brewer's own suggestion because he stated he could now make more money that way (154, 161, 183). At the conference of termination, only Messrs. Sibert, Hilts and Brewer were present (159, 232). The two former testified to the agreement to return to the franchise and Mr. Brewer admits the conference and subject matter thereof, but

denies he agreed to go back on the franchise, but with a reservation thereto hereinafter mentioned (285). The three parted good friends (162, 449), partly disclosed by Mr. Sibert's purchasing plane tickets for Mr. Brewer and daughter to go to San Francisco as Mr. Sibert's guests so that the Brewers would be together on their daughter's birthday (161-2, 484). This was denied by Brewer (289), but his disclaimer refuted by the record (162, 385). They all met in San Francisco and all the Brewers stayed at the Sibert home in Oakland, California, for five days (162, 444). Mr. Brewer's suggestion of going back to the franchise was made after Mr. Hilts had showed him the accounting of his business for the fiscal year. Then it was that Brewer said, "Well, that being the case, I can't afford not to be on the 20-80% franchise business because I will make more money that way than I will the other way." (233, 161).

At the time the expansion of the business was discussed, Mr. Brewer agreed to go back when he had \$3,000 worth of monthly business (147, 154), and in June, 1947, he had it (233). It was generally estimated that the expenses are 60% of the gross profits which would leave 20% for the company (234). And if an agent was a good operator, he could save on the 60% expense, which saving accrued to his benefit because the only direct monetary obligation to Paramount was to pay it 20% of the gross profit (31, 235). Some agents went as low as 45% for expenses (235). With the termination in mind, a full accounting (Ex. 36) was had between these parties. Mr. Hilts prepared the statement of Mr. Brewer's obligations under the modified fran-

chise, based on the figures in Mr. Brewer's books, and he helped prepare it (238, 240). It showed Mr. Brewer's indebtedness to Paramount in the sum of \$3,359.61, showed Mr. Brewer paid \$259.61 on July 9th (Exs. 37 and 38) "as a payment on money due them" (483), leaving the balance of \$3,100 even (240). The payment (Ex. 37) was endorsed on Exhibit 36 in Brewer's own handwriting (242, 310). Mr. Brewer states he knew what he was writing when he wrote the endorsement and then said he would not answer the question whether the accounting was on a 20-80% basis (491). He claims he made it on condition "if the accounting was right." He never advised the company but what the accounting was right (464). Mr. Brewer places himself in the unenviable position of having to admit he made a part payment on a statement made in detail (Ex. 36) from his books (493), with his cooperation (238, 240), and then endeavoring to avoid its effect by saying he did not understand it, that it did not look right to him (492) and he paid because Hilts wanted to take home some money (492).

(4) FINAL PERIOD OF REINSTATED FRANCHISE, JUNE 30th TO AUGUST 1, 1947.

(a) TESTIMONY OF REINSTATEMENT: According to Paramount, Mr. Brewer was happily back on the original franchise of July 1, 1946 (161-2, 449). Mr. Brewer denies he ever agreed to go back on the original franchise (285). But he admits and reiterates many times that he agreed that he "would carry the business for the month of July" (285, 315, 318, 452, 492, 500). It is sig-

nificant that according to his own testimony he did not tell Paramount what he would do "after July" (285). It is logical from his statements to conclude that he knew he was back on the original franchise and there is nothing in the record to deny this. How was he to carry it unless he was carrying it on the original franchise basis?

This final period terminated with Mr. Brewer's letter of July 24, 1947 (Ex. 42; 16). This letter in no way indicates his resignation and the termination were because of Paramount's "repudiation". Was repudiation an after thought? Mr. Brewer wanted "my franchise" (not the *modified* franchise) terminated according to this letter.

(b) CIRCUMSTANCES SHOWING REINSTATEMENT, and referred to under other subjects, are in part as follows:

(i) It is undisputed that Mr. Brewer's letter of resignation (Ex. 42) fell into Paramount's Oakland office like a "bombshell" (345), and the personnel had "a big surprise" (169) and were "dumbfounded" (406). Equally conclusively proven is the fact that Paramount called in men from other territories and other businesses, namely, La Pape, Dolbey, Moore and Brooks from Spokane, Eifers from Seattle, Sibert, Fisher and Hilts from Oakland, and C. W. Fisher from Sully-Van Corporation (351, 347-8, 378) at substantial expense (Ex. 53), in an attempt to salvage its business. It is reasonable to suppose the above would not have occurred had Mr. Brewer told Paramount that he would carry the business for July, 1947, only (p. 17 *supra*). Could he have told

Paramount's officers anything else but that he would go on the original franchise and expect them to conduct themselves as they did? If such warning were given, would all of Paramounts officers refrain from taking steps to protect their hard-earned business?

(ii) Mr. Brewer admits during July, 1947, he ordered thousands of sets of printed matter, announcing, describing and providing the means of conducting appellees' "Brewer Pest Control" competitive business (313-4, 323-331) and of this he admits he did not advise Paramount (315). Had Mr. Brewer advised Paramount of his printed literature and its purport, would they have believed he was going on with his original franchise? If he had advised Paramount that he was operating for them only for July, would he not also have advised them of his preparation to go into business himself? He testifies Mr. Sibert told him prior to July 1, 1947, that he would be "required" (284) to go back on the original franchise. Then, if any contrary information had been conveyed by Brewer to Paramount, would they have been "surprised", "dumbfounded" or bombshelled?

(iii) Mr. Brewer ordered "Brewer Pest Control" literature on July 7, 1947 (324 et seq.). On July 9, 1947 (two days later) he made a sedative payment of \$259.61 (Exs. 37, 38) on his accounting (Ex. 36), but admits he did not tell Paramount he was then preparing to go into his own business (315).

(iv) Mr. Brewer admits he did not give Paramount the ninety day written notice which he stipulated he would give in his franchise (30) because "If I gave them

that 90 days, they would move in here with a dozen men and take over possession of everything in sight, and I would be left sitting here broke." (308). Would not the same fears exist previously during the same month when he claims he did give notice of termination of his service? This was his only reason for not complying with the franchise (495). As late as June 30, 1947, Mr. Brewer made no claim of Paramount's repudiation, but based his terminal letter on his claim that he had supplied and financed Paramount as long as he could and now was getting out for self-preservation (345). The only witnesses to what occurred in June and July regarding going back on the franchise were Messrs. Sibert, Hilts and Brewer. Mr. Brewer erroneously claims his wife was there (473,—but see 444, 162, 235). The first two witnesses testified Brewer went back on the franchise happily and of his own volition. His oral testimony is all that supports his contention that he would carry it during July, and it was not until July 24, 1947, when he wrote his terminal letter, that he thought the franchise was of no value to either party (302-3); and Mr. Brewer never told Paramount he was through (161, 262). Mr. Brewer knew how others would appraise his letter and conduct in this termination when he said on July 30, 1947 (339) that "within the eyes of Paramount, they would be the worst so-in-so's in the world as of August 1st because they were not only leaving the organization and going into competitive business, but they were also taking all the Paramount employees with them into their business" (341).

(v) Mr. Brewer's claim of the continuing modifica-

tion was for the period of the contract, i.e., ten years, plus any automatic renewal for the same period of years and that in turn continued for a successive like period (30). Certainly, before such a long term modification would have been recognized, it is reasonable to suppose that such a long term radical modification would be reduced to writing.

(vi) Mr. Brewer testifies his divide-profits agreement was made with Mr. Sibert to run "for the life of the contract, as long as we were operating" (475). This Mr. Sibert denies (147).

Mr. Brewer's claim of modification, of which its duration is an integral part, fails in its entirety unless Mr. Brewer also proves both the existence of his modification (there could be no *extension* of a modification unless the *latter* was in existence) and Mr. Sibert's *authority* to make a "life" extension of the oral modification.

Granted for the purposes of argument only and not admitting the truth of Brewer's claim that Sibert agreed to extend any modification agreement for the "life" of their business relations, Mr. Brewer makes no proof of Mr. Sibert's authority to bind the corporation (Paramount). Since Mr. Sibert denies such an extension, Mr. Brewer has the burden of proving the extension and Mr. Sibert's authority to make it. In all modifications and extensions, testified to by Mr. Sibert, there were ratifications by other officers of or by the corporation itself (148, 224-5, 229, 230, Ex. 30-39, incl., Ex. 49, Ex. 57-61 B, incl.).

Where is there *any proof* of corporate *authority* for Mr. Sibert to make a "life" extension of the modification, or of corporate *ratification* of Brewer's "life" extension? There is none.

The existence of an agent's authority is a question of fact. *Neppach v. O. & C. Ry. Co.*, 46 Or. 374; *Bauer v. N. W. Blow Pipe Co.*, 75 Or. 1.

The agent can do for the principal only what the principal authorizes the agent to do. *Blackfeet Livestock Co. v. N. W. National Bank*, 138 Or. 530. Persons dealing with an agent have the burden of showing his authority. *Jones v. Marshall-Wells Co.*, 104 Or. 388. When Mr. Brewer dealt with Mr. Sibert he was bound at his peril to inquire and ascertain the extent of Mr. Sibert's authority to make such an agreement contradicting the terms of a written agreement. *Reid v. Alaska Packing Co.*, 47 Or. 215, 222; *Baker v. Seaward*, 63 Or. 350; *Pacific Livestock Co. v. Portland Lumber Co.*, 96 Or. 567; *Finney v. Stanfield Fraternal Assoc.*, 131 Or. 393; *Roemhild v. Home Ins. Co., et al.*, 130 Or. 50, 61.

While the California law, stipulated out of the record (413), throws a protection around such pretensions of oral modifications as this, nevertheless the common law in the case of corporations accomplishes the same effect by different means. This is shown by the above authorities.

In conclusion on these points, appellant submits on the "key question of credibility" (263), the circumstances, in addition to the testimony of reliable witnesses, prove and there is no reliable evidence that contradicts

appellant's claim that in the month when Brewer repudiated his franchise by his terminal letter (Ex. 42), the original franchise was in full effect.

B. No Repudiation by Paramount:

By the evidence indicated in Section A (*supra*), the original franchise (29-40) was established. To the franchise, as so proven, there is no pleading of repudiation, and the rights of Paramount to the continued original franchise are clear and the repudiation definitely Brewer's.

In pleading facts to support the charge of repudiation, Mr. Brewer alleged that "Paragraph 5 of the contract should be eliminated" (70). There is no evidence in this record to support such allegation. Mr. Brewer said it was "amended", but then both parties agreed that the paragraph was "modified", not eliminated (472). The success of appellee Brewer's affirmative defense of Paramount's repudiation (70) depends entirely on his sole questioned, contradictory and contradicted oral testimony that the modification was still in effect. The evidence, oral and of record, and circumstances detailed above, dispute and destroy Mr. Brewer's "distrusted" testimony. A solution of the issue is reached by a logical conclusion that there is no evidence that the modified franchise was in effect in July, 1947. The failure to prove its existence destroys appellee's defense.

III. Repudiation by Charles P. Brewer

With unusual certainty, Mr. Brewer testifies he terminated his "franchise agreement of July 1, 1946" because Paramount "didn't live up to" his agreed 50-50 distribution of net profits (306, 473-4). He testifies this was "entirely the reason * * * there was no other reason" (306), it was the "full and complete explanation" (474) for his termination. The further claim that Brewer repudiated the franchise is based upon his terminal letter of July 24, 1947 (Ex. 42; 16) delivered before his franchise had expired. This terminal declaration was augmented by the appellees' subsequent conduct by all Paramount employees leaving at one time and going into an association with Brewer. Under Brewer's second defense of Paramount's repudiation (70), there is no evidence of Paramount's confirming repudiation. It is unnecessary to cite the evidence in the arguments in support of this contention because the same conduct and declarations prove Brewer's repudiation that are cited above to deny his claim of Paramount's repudiation, and this item is supplied to complete the matter of repudiation as outlined in the "Points on which Appellant Intends to Rely". For appellee Brewer to prove repudiation, he must show more than the expression of an *intent* upon Paramount's part. The conduct of appellees was in law a repudiation of the franchise because it was "a present, positive, unequivocal refusal to perform the contract." *Gold Mining and Water Co. v. Swinerton* (Apt's. Op. Br. 25); *Flat Hots Co. v. Peschke Packing Co.*, 301 Mich. 337. The lack of proof of such required acts, fails to prove Paramount's

repudiation. If the District Court did take Mr. Brewer's testimony at face value, it meant nothing more than an expression of *intent* upon Paramount's part to revert to the original franchise. It was not accompanied by any positive act or demand for payment on the basis of the original franchise. Following Mr. Brewer's claim of *intent*, intervening circumstances might, as they had before, change that intent and permit reversion to the modified franchise. Mr. Brewer produces no acts by Paramount, in furtherance of its alleged *intent* to repudiate any franchise. There is, therefore, insufficient evidence to support the "repudiation" he pleads (70). *Rehart v. Klossner*, 48 Cal. App. (2d) 46; 13 C.J., "Contracts," §727, p. 654.

IV. Appellees' Conspiracy

The District Court, for the first time, makes findings and conclusions upon which its denial of injunction is based, that there is no conspiracy (547, 549).

1. This point has always been present in this case, charged in Paramount's complaint (Paragraphs IV to VIII) (9-26) and denied in appellees' answer (69), it was previously briefed (Ap't. Op. Br. 9-16; Rep. Br. 5-7), answered only by one sentence in appellees' brief (6).

2. The District Court has now changed the basis of its decision. Formerly, the Court said "* * * the controlling element is the time factor" and indicated otherwise it might uphold Paramount's contention because "customers lists are protected by the law" (73). Now

the Court follows appellees' brief that "these findings (of repudiation) negative the conspiracy claimed by the appellant" (Ap'e. Br. 6) by declaring that repudiation "negatived the claim of plaintiff that there had been a conspiracy" (543). The Court in its last opinion does not follow the pleadings of appellees of repudiation (70), but bases it on the fact that there has been a "breach by plaintiff" (543) of the franchise.

A "breach" of the contract means terms that have not been performed, but is different from a "repudiation" which is a denial of the entire contract and therefore "breach" differs from repudiation. "Failure to perform" or "breach" is not synonymous with "refusal to perform" or repudiation. *Brooks v. Scoutle*, (1932) 81 Utah 163; *Re. G. M. Goldberg Enterprises*, (1927) 225 N.Y.S. 513, 516.

3. Under the pleadings and evidence, written and oral, in this case there is more than one avenue by which plaintiff is entitled to relief and the appellees held responsible, and these avenues cannot be confined, as appellees desire, to the one issue of repudiation of Brewer's franchise.

These avenues are:—

(i) Liability against all appellees under the full charge of conspiracy as alleged in the complaint, including the binding effect of the original franchise agreement (See Par. 4 next below).

(ii) Under the same procedure, if the franchise which was personal to Brewer, be eliminated entirely from the

case, there is ample charge of conspiracy still remaining and ample proof of the performance of damaging overt acts which would render all the appellees responsible (See Par. 5 *infra*).

(iii) Finally, if we eliminate from this entire case any consideration of conspiracy, there remains ample proof of individual acts of Brewer which should be enjoined, and financial liability is proven against him (See Par. 6 *infra*).

4. In addition to what has been indicated in writing as to this broad charge of conspiracy, Paramount directs attention to the fact that this case is unusually clear on this charge, in that material and reliable evidence has been submitted disclosing the entire plan of the conspiracy as conceived in the minds of the conspirators *prior to any overt acts committed in its performance*. Generally, conspiracy is proven from the overt acts themselves, but in this case we have the following evidence outlining the proposed conspiracy and then followed by acts in furtherance of that conceived and intended plan.

In addition to the appellant's previous discussion on conspiracy (Apt's. Op. Br. 9-19), attention is directed to the evidence of C. W. Fisher (338-353) who testified that on July 30, 1947, at his room in the Roosevelt Hotel in Portland, Oregon, with Mr. and Mrs. Brewer in attendance, while he was employed by the Sully-Van Corporation, and after appellee Rightmire had left them, and between nine and ten o'clock of that evening, appellees Brewer had said they were leaving Paramount

in whose eyes "they (Brewers) would be the worst so-and-so's in the world as of August 1st, because they were not only leaving the organization and going into competitive business, but they were taking all the Paramount employees with them in their business * * *" (341), and that they "were and they had been collecting all the money that was on the books that they could possibly collect" (342), and they further stated that "* * * if, on August 1st, there was more than a dollar or two in Paramount's account they (Paramount) would be lucky" (342), and, further, that "Paramount would be in no position to take care of their accounts (meaning customers) for some months to come" (343); the Brewers further stated "they would establish their business in their home temporarily" (344) and that "they intended to keep the equipment and chemicals until they had been paid for that equipment, and that the usual procedure with Paramount would be that Paramount would take some time to do that, and they were going to keep it until they had received their money that was due for that equipment and chemicals" (344). These prophetic statements were accurate. To make them so accurate, it was necessary that these features were involved: first, there must be a well discussed and organized plan of what the conspirators would do, and, second, there must have been coordination and power to put it into execution. A reading of the record proves how efficiently the plan was executed and the prophesied results accomplished. This plan is more fully detailed in the testimony of C. W. Fisher and DeGray S. Brooks (338-369). None of Mr. Brooks' testimony is denied by

Brewer (455-6) and there are but two denials of Mr. C. W. Fisher's testimony by Brewer and these two denials related to records which disprove Mr. Brewer's contention and are as follows:—

(i) Mr. Brewer says, "I didn't tell him, though, that I was taking all the employees with me" (455), yet all employees admittedly went into Mr. and Mrs. Brewer's employ on the 1st of August, 1947, except Duncan who was in their employ a few days later. Mr. and Mrs. Brewer own this business (311), she owning a one-half (496) and it was their money invested (497). Carl Duncan joined the organization on August 20th (505) before this suit was filed (28) and then all the Paramount employees were associated with Brewers.

(ii) The only other denial by Brewer of C. W. Fisher's testimony is, "I don't remember saying anything about the bank account * * *" (455). This referred to the Brewers' prophecy that if "there was more than a dollar or two in Paramount's account they would be very lucky" (342), and Mr. Hilts' undenied testimony is that after the Brewers left on August 1, 1947, there was around \$4.00 left in the two accounts in the bank (384).

None of the other testimony is denied by the Brewers and subsequent events, as detailed in the evidence, prove their outlined scheme was carried into its full effect, some of which execution is indicated as follows:

They were doing what they could to collect accounts receivable. According to appellees' Exhibit 77 (82), on May 31st accounts receivable amounted to \$3,624.56 of

which Paramount collected "less than \$1,500" (389) between August 1st and the date of trial. The Brewers and associates did leave the organization; they did go into a competitive business under the assumed names relating to allegedly different ownerships (Exs. 46-48, inc.). As the Brewers stated, "they (meaning Paramount) would not have any equipment or stock, nor would they have any experienced personnel in this area, and, not being familiar with the accounts and not having the equipment that our former employees had, it would be a few months before we would ever be able to regain our status at that particular time" (343). All conspirators had knowledge of (a) contractual employment relations of Brewer and Rightmire, and (b) the contractual relations between Paramount and its customers, because they served the customers and the complaint served upon each employee in the state case disclosed their employment contracts if they did not have prior knowledge, and the state case "involves the same matters involved here" (413). All employees but Duncan were performing the conspiracy as of August 1, 1947. All the details of this conspiracy were worked out in advance, proof of which is unusual and not necessary for a conviction, but leads to a conviction through the unusual degree of reliable proof. *U. S. v. Pan-American Petroleum Co.*, (C.C.A. 9th 1932) 55 Fed. (2d) 753, 766.

5. The foregoing argument is presented with the sincere conviction that the original July 1, 1946 franchise was in effect when Brewer wrote his terminal letter.

Without detracting one whit from that conclusion, Paramount claims the trial court's adoption of Brewer's theory that alleged repudiation of the franchise negated the charge of conspiracy, is error because the allegations of conspiracy (14-15) are sufficient and the evidence ample to prove actionable conspiracy even though the Brewer franchise were not a fact in the case.

The legal principle is universal that the act of an individual may not create a liability, but the same act created by several in combination may constitute an actionable wrong. 12 C.J. 583, §102, and cases.

Obviously, an organized body of men operating in unison can be a greater power of coercion or other advantage, such as sole contact and service with customers, and thereby produce results very different from those of an unassisted person. 12 C.J. p. 583, cases in Note 71.

The principle of honest competition and the individual's right to earn a living in any competitive business, is equally well established, provided there is no lawful contract to the contrary and no unlawful means or purposes involved. The inclusion of the Brewer franchise (29-40) in the allegation of conspiracy (13-16), if entirely omitted, would leave the following charge: Paramount's method of doing business, the names and addresses of its customers, the written contracts with customers under which service was being rendered as well as the names of other customers not under contract, were all more completely within the knowledge of appellees than of Paramount. The use of the materials and equipment and method of application

by employees trained by Paramount, were used by appellees who were the only men and service known to the customers. However scanty may be the training, as claimed by the appellees, nevertheless it undisputedly was sufficient to qualify them for a business in which none of them prior to the connection with Paramount had ever been engaged, and for them to hint that it was inadequate or insufficient, is to deny their own efficiency at a time when they actually built up a material business under Paramount's organization and financing. Then *all* employees left *all* of Paramount's interests and *all* went into "Brewer Pest Control" and served *all* of the customers who they could serve at *all* times. Such alleged and proven conspiracy involves damaging overt acts and constitutes a basis for injunctive and monetary compensation and does not depend on the validity of the single instrument (franchise contract) in the over-all scheme and effect.

Without duress, fraud or validity of franchise, if these employees, in combination, intended to and by act did deprive Paramount of its business when they were in position to exercise the power to accomplish such unlawful ends, a conspiracy exists which creates their liability. Evidence of this nature fulfills the requirement that a civil conspiracy must be a combination of two or more persons who by concerted action accomplish the unlawful purposes of a preconceived plan and the unity of design and purpose of such a common understanding is of the essence of conspiracy. 15 C.J. S. pp. 996-7.

The plaintiff's business is a property right and the

unlawfulness of a conspiracy may be found in the attempt to destroy it. *Truax v. Corrigan*, 257 U.S. 312. To induce another, such as the plaintiff's customers, to avoid their contractual obligations to the plaintiff and thereby injure it, is an actionable tort, whether under conspiracy or not, because it is a malicious interference with plaintiff's business. *Ransom v. Dollar Steamship Lines*, 2 Fed. Supp. 409; *Angle v. Chicago, St. Paul, Minneapolis and Omaha Ry.*, 151 U.S. 1.

Liability for such conduct is predicated on the theory that a contract right is property which is to be protected against undue influence by persons not parties thereto, since such action on their part is a direct invasion of the contract right. 15 C.J.S. 1021, §13, Notes 60 to 72; 11 *Am. Jur.* "Conspiracy" p. 582; 84 *A.L.R.* Note pp. 48, 98.

In *Jones v. Baker*, 7 Cowen 444, the foreman of a company conspired with his employer's rival to learn his employer's business and serve the employer's trade. This was done to the employer's damage and the court held it constituted an actionable conspiracy, though no contract whatever was involved.

In *Angle v. Chicago, etc. Ry.*, 151 U.S. 1, the defendant company induced another company to break its contract with the plaintiff and prevent performance. The court held that such constituted an action on the case for maliciously interfering with the contract between two parties by inducing one to break the contract to the injury of the other and that liability resulted. The same identical principle is involved in the case here

where the former employees admittedly induced not less than 141 former customers to break their contracts with plaintiff (46-50, 439, 433).

In *Iron Molders Union v. Allis-Chalmers Co.*, 166 Fed. 45, the court at length describes how workmen may unionize and combine to force demands for wages and in the absence of the violation of contract or under conspiracy, may go into a competitive business, but employees cannot combine to interfere with a company's contracts with apprentices, and customers' service contracts would of course be as inviolate as the company's contracts with apprentices.

In *Barden Cream & Milk Co. v. Mooney, et al.*, 305 Mass. 545, the employees of the plaintiff knew of its customers and all left to take the business to a rival concern, just as Paramount's employees, occupying positions of trust and confidence, knowingly took all of its customers to one of their number setting up a competitive business. The Massachusetts court declared the commission of this tortious act of the breaking of their trust, *even if under no contractual relation to continue in their employer's service*, rendered the employees liable in damages for their combined action.

In *Longshore Printing Co. v. Howell*, 26 Or. 527, there was a boycotting of plaintiff's customers to prevent their doing business, but in principle there seems to be no distinction, so far as the damage to plaintiff's business is concerned. In one instance it is by failing to do business with plaintiff's customers and in the other instance it is taking over for themselves plaintiff's business,

which results in both instances in a combination of men working in unison for an unlawful purpose and resulting in plaintiff's damage.

In conclusion on this point, it seems very obvious that in a proven conspiracy wherein former employees combined to take away the business of their employer, known to and served by them solely by virtue of their employment, they commit an unlawful conspiracy here shown to have resulted in damage. Whether there is proof of some alleged part of their conspiracy, makes no difference if there is sufficient proof of the conspiracy as a whole. So if Brewer's franchise were omitted from this case, there would still be ample proof of this unlawful conspiracy.

6. The third ground of liability mentioned in this brief above (p. 27) is argued on page 37 *infra*.

V. Damaging Overt Acts

Appellant claims the court fails to find damaging overt acts.

This issue is raised by the allegation of such acts in the complaint (16-21) and denied by appellees (69).

Obviously, the court's failure to find damaging overt acts is predicated upon its failure to find a conspiracy (547). "An over act" is best described in defining the civil liability of a conspiracy, viz., it is an act done by one or more of the conspirators in performance of their common design and calculated to accomplish its object. *Lewis Invisible Stitch Machine Co. v. Columbia Blind*

Stitch Machine Mfg. Corp'n., 80 Fed. (2d) 862; *Northern Kentucky Telephone Co. v. Southern Bell Telephone & Telegraph Co.*, 1 Fed. Supp. 576; affirmed C.C.A. 73 Fed. (2d) 333; 97 A.L.R. 133; cert. denied 294 U.S. 719, 79 L. Ed. 1251.

Proof that the appellees acquired a substantial amount of the business of appellant formerly under contract with appellant, as well as the performance of other overt acts alleged (14-16) is proof of overt acts in this case.

VI. Appellant complains that the District Court still refuses to grant the plaintiff the relief of:—

A. INJUNCTION. The present denial by the Court of Paramount's claim for injunctive relief (551) is based on its conclusion that there is no conspiracy (547) and damage if any arose from its own fault (543). Apparently, if conspiracy were concluded by the Court to have been proven, injunctive relief would follow. In any event appellant has made its position clear and cited ample authority therefor (Op. Br. 28-32). This refers to Point VII in the notice of points upon which appellant intends to rely.

B. MONETARY COMPENSATION: The Court decreed that "plaintiff take nothing against the defendants" (551). On the point of monetary recovery, appellant has from the beginning endeavored to make it crystal clear that it seeks recovery upon two grounds:

- (1) Against Brewer alone on contract obligations

(21-23, 26; Op. Br. 33-36), and (2) against all appellee employees in tortious acts causing damage and arising out of their conspiracy (23-25; Op. Br. 35-6).

The Court denies damage to plaintiff because any damage "was occasioned by its own fault and not recoverable from defendants * * *" and because "the evidence on both sides was conflicting and unsatisfactory" (543). No citation or examples supporting these criticisms are offered. To the claims for damage and the authorities in support thereof, appellees made no answer whatever in their previous brief. Neither the Court nor appellees answer Paramount's claim for payment of *contracted obligations*.

This proceeding sounds in conspiracy, but broadly speaking, there is no such thing as a civil action for conspiracy. Such is really an action for damages caused by acts committed pursuant to a formed conspiracy rather than the conspiracy itself. Unless damage results from a conspirator's act, there is no civil action. 11 *Am. Jur.* 577 "Conspiracy" §45. The gist of action is the wrongful conduct resulting in plaintiff's damage and the charge of conspiracy is involved only as bearing on rules of evidence, enhancing damages, or bringing liability to someone within the scope of the conspiracy but who did not perform overt acts. In such cases as this, failure to prove an allegation of conspiracy does not affect the plaintiff's rights to recover on independent grounds showing a liability upon the conspirator whose conduct has damaged the plaintiff or upon the promise of one to

pay a specific sum of money. The difference is that conspiracy includes all where the act of one by virtue of their combination involves liability on all, but if the charges of the complaint are sufficiently specific, there are independent grounds of recovery against the person promising to pay money or actively participating in the unlawful conduct charged and whose acts in the scope of time, substance and result have united to produce the damage. 12 *C.J.* 589-615 "Conspiracy".

Admittedly, there are cases where the combination or collective action alone constitutes the gist of the action and where recovery of any kind is to be had, it is necessary to prove the conspiracy.

Cases of both nature have been collected in Volume 152 *A.L.R.* Note 1147, 1156.

(1) Reverting to the liabilities of Charles P. Brewer on contract (21-23), the first obligation is for \$3,100. This is an individual obligation, not arising out of damages but owed on an accounting taken from the figures of his own books and on a statement which he assisted in preparing and upon which he has made part payment (Exs. 36, 37, 38). Mr. Brewer's testimony that he had done this because Mr. Hilts "* * * would like to take some money home * * *" is not a defense (310). Especially in view of his further confession that he "* * * was still in debt a certain amount of money to Paramount and any money that I gave him was to apply on that debt" (310).

On the second item, which is the amount of money due from Brewer to Paramount out of the gross earnings in carrying on the franchise for July, 1947, whether the franchise was carried on under the original July 1, 1946 agreement or some modified form, Brewer owed something out of the returns, yet his blanket denial of any liability is acquiesced in by the trial court.

Without pursuing these individual obligations further, it is apparent that notwithstanding the charge of conspiracy, there are sufficient allegations in this complaint with supporting evidence consisting of detailed accountings and exhibits which show a proper basis for recovery. The decisions unanimously support recovery from Brewer individually. *Gabriel v. Collier*, 146 Or. 247, 255; *Keller v. Commercial Credit Co.*, 149 Or. 372, 375; *Rouse v. Equitable Savings & Loan Ass'n.*, 151 Or. 427, 435; 12 C.J. "Conspiracy" §104, p. 584; 152 A.L.R. 1147; 11 Am. Jur. 577, §45. Failure to prove a conspiracy does not prevent the plaintiff from recovery on contracts. *Aughey v. Windram*, 137 Ia. 315.

(2) Against all appellees for the damage done plaintiff by their conspiracy, specific charges were made (23-25) and denied by appellees (67) and not allowed by the Court (543, 551) and the exhibits showing these items of damage and the pages where the matter is discussed are shown in the Opening Brief (pp. 35-37), and none of these items denied in the original appeal by appellees.

VII. If Paramount prevails in this appeal, it is entitled to costs (Rule 54(d) F.R.C.P.) and the merits of its case, as against the conduct of the appellees, would indicate the justice of such a disposition of costs.

Respectfully submitted,

KENNETH C. GILLIS,

and

ROBERT R. RANKIN,

Attorneys for Appellant.

In the United States
COURT OF APPEALS
for the Ninth Circuit

PARAMOUNT PEST CONTROL SERVICE,
a corporation,

Appellant,

v.

CHARLES P. BREWER, individually and
doing business as Brewer's Pest Control,
ROSALIE BREWER, his wife, RAYMOND
RIGHTMIRE, CARL DUNCAN and
EARL MERRIOTT,

Appellees.

BRIEF FOR APPELLEES

Upon Appeal from the District Court of the United
States for the District of Oregon.

LOWDEN STOTT,
Yeon Building,
Portland 4, Oregon,

COLLIER AND BERNARD,
Spalding Building,
Portland 4, Oregon,
Attorneys for Appellees.

FILED

APR 11 1949

PAUL P. O'BRIEN,
CLERK

TABLE OF CONTENTS

Page

Statement of Case.....	1
There Is Substantial Evidence That the Franchise Agreement on Which This Action Was Brought Was Modified as Claimed by the Appellee Brewer, That the Appellant Refused to Be Bound by the Agreement as Modified and That the Appellees Were Not Guilty of Conspiracy.....	2
Points and Authorities.....	2
Argument	5

TABLE OF AUTHORITIES

	Page
Coe, et al. v. American Fruit Growers, Inc., 164 Ore. 90, 96; 100 P. (2d) 1934 (1940).....	4
Fernandez v. Cano, et al., 108 S.W. (2d) 310, 313 (Tex., 1937)	4, 5
Fletcher, Vol. 2, Cyclopedia of the Law of Corpora- tions, sec. 667 (Revised and Permanent Edition, 1931)	3
Horner v. Pleasant Creek Mining Corporation, 165 Ore. 683, 699; 107 P. (2d) 985; 109 P. (2d) 1004 (1944); 15 C.J.S., Conspiracy, sec. 30, pp. 1048, 1049	5
Lane, et al. v. National Insurance Agency, et al., 148 Ore. 589, 598; 37 P. (2d) 365 (1934).....	3, 4
Martin v. Webb, 110 U.S. 7; 28 L. Ed. 49; 3 Sup. Ct. 428; 7 R.C.L. 623, sec. 620.....	4
Rae v. Heilig Theatre, 94 Ore. 408, 413; 185 Pac. 909 (1919)	4
Title and Trust Company v. Security Buildings Cor- poration, 129 Ore. 262, 270; 277 Pac. 85 (1929)....	5
United States v. Aluminum Co. of America, et al., 2 Cir. 1945, 148 F. (2d) 416, 433.....	7

In the United States
COURT OF APPEALS
for the Ninth Circuit

PARAMOUNT PEST CONTROL SERVICE,
a corporation,

Appellant,

v.

CHARLES P. BREWER, individually and
doing business as Brewer's Pest Control,
ROSALIE BREWER, his wife, RAYMOND
RIGHTMIRE, CARL DUNCAN and
EARL MERRIOTT,

Appellees.

BRIEF FOR APPELLEES

Upon Appeal from the District Court of the United
States for the District of Oregon.

STATEMENT OF CASE

In November, 1948 this court ordered that the judgment of the District Court of Oregon be vacated and directed that additional findings be made and a judgment entered upon the findings. Additional findings were made in accordance with the mandate and a judgment was entered thereon in favor of all of the de-

endants with the exception of Carl Duncan. He was never served with process and was dismissed from the case at the trial of the issues in the lower court.

On the first appeal of this case the appellees filed a brief with argument and citations to the effect that

- (a) findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses;
- (b) the appellant did not disclose to the appellees any receipts, formulae or secret processes;
- (c) an injunction should not issue against a former employee if the employer has been guilty of inequitable conduct or has himself breached the contract.

On remand the District Court made additional findings, among others, that the defendants were not guilty of conspiracy as alleged in the complaint.

THERE IS SUBSTANTIAL EVIDENCE THAT THE FRANCHISE AGREEMENT ON WHICH THIS ACTION WAS BROUGHT WAS MODIFIED AS CLAIMED BY THE APPELLEE BREWER, THAT THE APPELLANT REFUSED TO BE BOUND BY THE AGREEMENT AS MODIFIED AND THAT THE APPELLEES WERE NOT GUILTY OF CONSPIRACY.

POINTS AND AUTHORITIES. 1. An officer or agent of a private corporation, entrusted with the general management and control of its business and affairs, has implied or apparent authority to do acts or make any contracts in its behalf falling within the scope of the ordinary and usual business of the company, and limita-

tions and restrictions placed upon his express or implied authority, of which persons dealing with him have neither actual nor constructive notice, will not serve to restrict such powers to the prejudice of third persons. 2 Fletcher, *Cyclopedia of the Law of Corporations*, sec. 667 (Revised and Permanent Edition, 1931).

2. The president, vice president, secretary or treasurer may in effect be the general manager of the whole business or a specific part of it without regard to whether he is expressly designated as manager or whether his managerial work is recognized as a separate office or employment. In such case, his powers are not measured by the powers of a president, vice president, secretary or treasurer, but by the powers of a general manager of all or a part of the business. It is not necessary, in order that one may have the powers of a general manager, that he be denominated as such or that such an office or position exists; but it is sufficient that the corporation permits him to conduct and manage the business without objection. So it is not necessary that any resolution should be passed appointing a general manager in order to bind the corporation by the acts of an officer, who is in fact permitted or authorized to manage the business. *Lane, et al. v. National Insurance Agency, et al.*, 148 Ore. 589, 598; 37 P. (2d) 365 (1934).

3. Although there is no record that an officer of a corporation is expressly authorized by the board of directors to act, yet corporations act through their officers and agents and the authority of an officer of a corporation to act as a managing agent thereof may be inferred

from a long term continuance on the part of such officer in the performance of the duties of managing agent. *Lane, et al. v. National Insurance Agency, et al.*, supra, p. 596.

4. When, in the usual course of the business of a corporation, an officer or agent has been allowed to manage certain of its affairs, his authority to represent the corporation may be implied from the manner in which he has been permitted by the directors to transact its business. The usual employment is evidence of the powers of an agent, and the principal is bound by the acts of his agent within the apparent authority conferred upon such agent. The primary object of a corporation in employing an agent is that he shall be enabled to accomplish the purposes of the agency, and other persons are invited to deal with the agent with that understanding. *Rae v. Heilig Theatre*, 94 Ore. 408, 413; 185 Pac. 909 (1919); *Martin v. Webb*, 110 U.S. 7, 28 L. Ed. 49; 3 Sup. Ct. 428; 7 R.C.L. 623, sec. 620.

5. In Oregon the law is well settled that the powers of the managing officers of a corporation are co-extensive with those of the principal except in relation to matters over which the stockholders alone have control. *Coe et al. v. American Fruit Growers, Inc.*, 164 Ore. 90, 96; 100 P. (2d) 1934 (1940).

6. A party seeking to establish conspiracy and fraud must do so by full, clear and satisfactory evidence. It is not sufficient to show disconnected circumstances which may be as consistent with a lawful purpose as one which is unlawful. *Fernandez v. Cano, et al.*, 108 S.W. (2d) 310, 313 (Texas, 1937); Title and Trust

Company v. Security Buildings Corporation, 129 Ore. 262, 270, 277 Pac. 85 (1929); Horner v. Pleasant Creek Mining Corporation, 165 Ore. 683, 699; 107 P. (2d) 985, 109 P. (2d) 1004 (1944); 15 C.J.S., Conspiracy, sec. 30, pp. 1048, 1049.

ARGUMENT. A statement of the case was made in the brief filed by the appellees in the first appeal of this case. This statement is before the court on this second appeal (561) and should be read in connection with this argument that the evidence in the case supports the findings which have been made by the District Court.

The trial court found that the franchise agreement had been modified as contended by Brewer, that the appellant repudiated the agreement as modified, and that the appellees were not guilty of any conspiracy. Substantial evidence supports all of these findings. While the question of the modification of the franchise agreement and the repudiation of it by the appellant might be considered apart from the question as to whether a conspiracy existed between the appellees as alleged in the complaint, the three are so inextricably interwoven that they will be treated together.

The complaint alleges that in 1946 the franchise was modified with respect to the amount of payment to be made to Brewer. Theodore C. Sibert was president of appellant corporation. The record throughout shows that he was an active manager of the business. Brewer claims and the appellant admits that the contract was modified but the parties differ as to the terms of the modification. Sibert reported to the other two members

of the Board of Directors, Glenn H. Fisher and Harold W. Hilts (148), that some months before he had agreed to an oral modification of the franchise agreement. There is no evidence that these men at that time questioned Sibert's authority to modify the franchise agreement. Each of the directors testified at the trial and none of them questioned Sibert's authority. This issue is injected into the case for the first time on this second appeal. Under the authorities cited above, it must be clear that Sibert had authority to agree to the modification of the franchise and the only issue is whether there is evidence to support the findings.

It is alleged in the complaint that Brewer severed his connection with the appellant because of the conspiracy which is claimed existed between the appellees. The other overt acts mentioned in the complaint make it clear that the appellant claims the conspiracy existed prior to the 24th day of July, 1947.

Brewer was first employed by a partnership consisting of Sibert and Fisher. He was brought to Portland from California at a salary of \$250.00 per month to succeed one Taylor who was being paid \$200.00 per month and twenty per cent of the gross profits of the business. As of July 1, 1946 and before the corporation was formed (101), the franchise agreement was signed. Appellee Rosalie Brewer was never employed by the appellant (95, 99). Appellee Earl Merriott never signed a contract with the appellant. Appellee Raymond Rightmire was employed by the partnership and about the time of the signing of the franchise agreement it appears

without contradiction that he was informed by the partnership that he was no longer working for the partnership and that he was working for Brewer (416-417). No written contract of employment was ever made or existed between the appellant and Rightmire. The only act of Brewer prior to July 24, 1947 that Sibert complained about was the fact that he took a lease in his name doing business as Paramount Pest Control (179). It appeared, however, that this was the exact name in which liability insurance procured by appellant had been written (180, 272).

Brewer testified that in 1946 the franchise was modified by an oral agreement entered into between Sibert and Brewer so that the net profits should thereafter be divided on a 50-50 basis as long as the franchise was in force (277-278, 306, 308). Sibert admitted an oral modification of the franchise agreement but differed with Brewer as to the terms of the modification. A question of credibility, therefore, was presented to the trial judge and he found in favor of Brewer. Where a trial judge has seen the witnesses, his findings insofar as they depend upon whether they spoke the truth must be treated as unassailable. *United States v. Aluminum Co. of America, et al.*, 2 Cir. 1945, 148 F. (2d) 416, 433. However, subsequent events corroborated Brewer and seriously challenged the veracity and motives of Sibert.

On February 6, 1947 and on March 6, 1947 Brewer made payments to appellant and marked on one check "For Franchise" and on the other check "To Apply On 1946 Franchise". Brewer had not at that time been in-

formed by the appellant that it intended to repudiate the modification to which Sibert had agreed. At the time the payments were made, Brewer had not been presented with a statement showing that as of January 1, 1947 the accounts would be cast on the franchise basis unmodified. Notwithstanding this, it is argued in appellant's brief (11) that this constitutes some sort of an admission on Brewer's part. Brewer is not a lawyer. If he had been able to foresee Sibert's duplicity, he might have written "Franchise As Modified". Whatever else may be doubtful in this case, it is certain that the case will not be decided by such fly specs as are here suggested by appellant.

The events beginning with March 13, 1947 are important. On that date Hilts, appellant's auditor, presented Brewer a statement showing that Brewer owed \$994.25 for the months of January and February, 1947, an amount arrived at by allotting twenty per cent of the gross to the company. Brewer gave the auditor a check and told them that he was through (278-279). On Sunday morning, March 16, 1947, Brewer received at his home an airmail special delivery letter which recast the account so that the net profits would be divided on a 50-50 basis (280, Ex. 29). On receipt of the letter Brewer continued to carry on the business.

Before referring to the contents of the letter, it is important to turn at this point to the opening statement of counsel for appellant and to the testimony of Sibert. In explanation of why the accounts subsequent to January 1, 1947 were cast on a 50-50 basis, counsel told the

court “* * * It was Paramount’s own idea that they voluntarily give to Mr. Brewer—and it was done without his request and even without his knowledge, after consultation of Sibert and Hilts—a continuation of the dollar-home, dollar-company basis, and Mr. Brewer was written to that effect by a letter which will appear in evidence * * *.”

In support of this opening statement, Sibert testified:

“Q. What did you mean by saying that the verbal agreement was taken cognizance of?

A. As I remember our agreement, Mr. Brewer went back on the 80-20 in January or possibly February.

Q. That does not answer my question. What bearing did it have on May, 1947?

A. May, 1947, we, ourselves, because of this Eastern Oregon expense and loss, put the Portland office back on the dollar-for-dollar.

Q. When did you do that?

A. May 15th.

Q. Did you see Brewer at that time?

A. No, sir.

Q. By whom was that agreed to?

A. In conference with Mr. Hilts and myself.

Q. Was Mr. Brewer present?

A. No, sir.

Q. Was it at his solicitation?

A. No, sir.

Q. How was he notified of it?

A. By letter.

Q. What was the date of that letter?

A. May 15th.

Q. March 15th, isn’t it?

A. March 15th. As I recollect, March 15th.

Q. March 15th?

A. Yes.

Q. When you have been saying ‘May’ all the way through, that was in error?

A. That is right, Counsel.

Q. I want you to refer to Exhibit No. 29 and ascertain if that is the letter you have reference to?

A. It is.

Q. What is the date of that letter?

A. March 15, 1947.

Q. Do you wish to correct your testimony to conform to March rather than May?

A. I was confused. I wish to correct my testimony." (155, 156).

The sending by Hilts two days after he left Portland of an airmail special delivery letter to reach Brewer at his home on a Sunday morning was not necessary to announce that the appellant had decided without consultation with Brewer to continue the oral modification of the franchise. Brewer had given Hilts a check on March 13th based on the 80-20 franchise provision, so, if their testimony was true, he was not complaining. It was quite urgent that immediate word reach Brewer who had said he was through, that Hilts had been in error in setting up the accounts beginning January 1, 1947 on the old franchise basis. Nothing is contained in the letter concerning this uninvited gift which was to be given to Brewer. Instead the letter calls attention to the account which is set up on a 50-50 basis. Under cross-examination as to the contents of the letter, Hilts testified:

* * * "Q. You say, 'For January and February there is a net profit of \$1,016.55 with the franchise out of it', now you have drawn \$512.22 for both months; if we take \$512.22 like you did that will be your franchise for January and February."

* * *

"Q. Then, you say: 'Ted tried to explain this to

me just before I came up this last time, but I didn't get it.' Who do you mean by 'Ted'?

A. Mr. Sibert is referred to as 'Ted'. * * *

The actions of the appellant following March 13th are inconsistent with its claim that the modification was intended as a gift to Brewer and are consistent with Brewer's version of what actually transpired.

It is beyond dispute that as of July 1, 1947, Brewer was put back on the original franchise basis of 80-20. The appellant is in no position to contend that the evidence shows a mere intention on its part to return to the franchise basis because it is here claiming that among other amounts it should be allowed the franchise amount for the month of July, 1947. Its explanation as to why Brewer was placed on the original franchise basis is beyond belief. Brewer had been contending since the fall of 1946 that he could not make any money on the franchise basis. He had strenuously objected being forced to return to the franchise basis in March, 1947, and yet these men would have had the trial court believe that Brewer asked to be put back on a basis which would insure a loss to him. Brewer's testimony is the more credible. In June, 1947, Brewer was notified that as of July 1st he would have to pay the company twenty per cent of the gross (284-285, 315). At that time Brewer notified the appellant that he would carry the business through the month of July and on July 24th he sent his letter of resignation. It is submitted that there is ample and substantial evidence to support the finding of the trial judge that "About the 30th day of June, 1947 the plaintiff, in violation of its agreement,

repudiated the franchise agreement as modified and notified the defendant Charles P. Brewer that he would thereafter be required to pay the plaintiff twenty per cent (20%) of the gross business done by him. Because of such repudiation by the plaintiff of the franchise agreement as modified and for no other reason and not because of any conspiracy or confederation or agreement among the defendants, the defendant Charles P. Brewer sent in his resignation as agent to be effective August 1, 1947, and because of such repudiation and for no other reason and not because of any conspiracy or confederation or agreement among the defendants said defendant resigned as such agent and went into business for himself under the name and style of Brewer's Pest Control."

Early in July, 1947, Brewer made preparation to set up his own business on August 1st. There is no evidence that he consulted with any of the other appellees or that the appellees knew of his plan. Brewer claims that the appellant violated its agreement with him and that he was justified in setting up his own business and in competing with the appellant. (See Points and Authorities, pp. 7, 8 and 9 of Brief for Appellees on the first appeal.) There is no evidence that Brewer induced any of the other appellees to sever their connection with the appellant. Each of them was free to leave appellant's employ and Brewer offered them the opportunity of employment. The appellant complains that the assumed business name certificate was signed and filed by Mrs. Brewer. Brewer testified that this was a mere business convenience for him and the trial judge so found (Finding No. 10, Supplemental Transcript of Record 548).

If Brewer had been engaged in a conspiracy, the last person he would have had sign the certificate was his wife. No list of the appellant's customers was taken and no receipts, formulae or secret processes of the appellant have been used in the business conducted by Brewer's Pest Control. It is significant that of all the appellant's customers none were produced to testify that any of the appellees induced or attempted to induce them to breach any contract with the appellant. Brewer let it be known throughout the territory that he was in business for himself and solicited some persons who had been customers of the appellant. On this phase of the case the trial judge found as follows:

"None of the defendants took from the records of the plaintiff the private information of the plaintiff or copies of the names and addresses of customers and none of the defendants aided the defendant Charles P. Brewer to do any of the things alleged in the plaintiff's complaint to be in violation of the franchise agreement of the defendant Charles P. Brewer. The defendants, other than defendant Rosalie Brewer, has solicited business from some of the former customers of the plaintiff, and the defendant Charles P. Brewer has been giving pest control service to some of the former customers of the plaintiff but the solicitation of such customers and the rendering of such pest control service were not pursuant to any conspiracy, combination or agreement alleged in the complaint but the customers were solicited and the services rendered to them in the course of business competition between the plaintiff and Charles P. Brewer, doing business as Brewer's Pest Control. I am unable to find from the evidence that the defendant Charles P. Brewer is indebted to the plaintiff in any amount or that the defendants are indebted to the plaintiff in any amount."

A party seeking to establish conspiracy and fraud must do so by satisfactory evidence. It is not sufficient to show disconnected circumstances which may be as consistent with a lawful purpose as one which is unlawful. The trial judge had the opportunity of listening to the witnesses, observing their demeanor on the stand and his findings cannot be disturbed as long as there is substantial evidence to support them. With respect to the last part of the finding above quoted, attention is called to the significant fact that an accounting was made by the accounting firm of Sawtell, Goldrainer & Co. which Brewer claimed showed the amount of \$1,-305.97 owing to him. This accounting was never produced by the appellant (460-462).

It is respectfully suggested that the findings of the court are full and complete, supported by substantial evidence and that the judgment should be affirmed.

Respectfully submitted,

LOWDEN STOTT,

E. F. BERNARD,

Attorneys for Appellees.

In the United States
COURT OF APPEALS
for the Ninth Circuit

PARAMOUNT PEST CONTROL SERVICE, a
Corporation,

Appellant,

vs.

CHARLES P. BREWER, individually and doing
business as Brewer's Pest Control, ROSALIE
BREWER, his wife, RAYMOND RIGHT-
MIRE, CARL DUNCAN, and EARL MER-
RIOTT,

Appellees.

APPELLANT'S PETITION FOR REHEARING

Upon Appeal from the District Court of the United
States for the District of Oregon.

KENNETH C. GILLIS,
1103 Central Bank Building,
Oakland 12, California,

ROBERT R. RANKIN,
710 Yeon Building,
Portland 4, Oregon,
Attorneys for Appellant.

SUBJECT INDEX

	Page
Introduction	1
I. Appellee Brewer Owes Appellant Paramount the Sum of \$3,100 on a Voluntary Settlement Partly Paid	2
Appellant's Case	2-3
Appellees' Case	3-6
II. Appellee Brewer Owes \$478.15 to Paramount for July 1947 Business	6
Appellant's Case	6
Appellees' Case	6-7
III. Appellee Brewer Owes \$973.30 to Paramount for Fixed Assets Taken by Him from Para- mount	7
Appellant's Case	7-8
Appellees' Case	8-9
IV. Appellee Brewer Owes Paramount \$925.89 for Unsupported Expenditures	9
Appellant's Case	9
Appellees' Case	9
Conclusion	10

TABLE OF AUTHORITIES

	Page
County Trust Co. of Md. v. Stevenson, (1936) (Md.) 185 A. 435.....	5
Morris v. U. S. Equitable Life Assurance Society, (1922) 109 Neb. 348, 191 N.W. 190.....	5

COMPILATIONS

30 Cyc., "Payment," p. 1220.....	4
40 Corpus Juris §68, p. 631.....	4
1 O.C.L.A. §2-407 (6).....	8, 10
1 O.C.L.A. §2-1001 (3).....	9

In the United States
COURT OF APPEALS
for the Ninth Circuit

PARAMOUNT PEST CONTROL SERVICE, a
Corporation,

Appellant,

vs.

CHARLES P. BREWER, individually and doing
business as Brewer's Pest Control, ROSALIE
BREWER, his wife, RAYMOND RIGHT-
MIRE, CARL DUNCAN, and EARL MER-
RIOTT,

Appellees.

APPELLANT'S PETITION FOR REHEARING
(Rule 25)

To Chief Judge, William Denman, and the Associate
Judges for the Court of Appeals for the Ninth Circuit:

The appellant herein respectfully petitions this
Honorable Court to grant a rehearing of its decision
filed herein on October 27, 1949, upon the following
grounds: that the evidence herein cited has been over-
looked or not given due weight.

Appellant asks for a rehearing on the following points relating solely to monetary obligations due appellant from appellee, being four in number, and described as follows:

**I. Appellee Brewer Owes Appellant Paramount the
Sum of \$3,100.00 on a Voluntary
Settlement Partly Paid.**

APPELLANT'S CASE: On June 17, 1947, Paramount's President Sibert and Secretary-Treasurer Hilts and Mr. Brewer agreed to make a settlement of the account between Paramount and Mr. Brewer for the period from July 1, 1946, to July 1, 1947 (229, 230, 238).^{*} Mr. Hilts, with Mr. Brewer's help (160,238), compiled a statement—Exhibit 36 (157, 238) taken from Mr. Brewer's records,—books and invoices (159, 238) which showed Mr. Brewer owed Paramount \$3,359.61 (160, 240, 273). This accounting stood until July 9, 1947, when Mr. Brewer admittedly paid thereon by check (Ex. 37) supported by voucher (Ex. 38 (310, 373)), the sum of \$259.61. He had no more money and was not pressed for payment (241). Mr. Brewer agreed to pay the balance of \$3,100 (160,240) as the money came in and as long as payment did not hurt the business (241). In his own handwriting, Mr. Brewer endorsed on the accounting (Ex. 36) the words: "July 9, 1947, paid, check No. 413, \$251.61" (242). The balance of \$3,100 is unpaid (373). The accounting (Ex. 36) was prepared on a basis claimed by Mr. Brewer (273), in a detailed manner

^{*}Figures, unless otherwise indicated, refer to pages of the Transcript of Record.

(239) and on the basis approved by the trial court (543).

APPELLEES' CASE: Mr. Brewer admits he saw the accounting, made the part payment and endorsed it on the accounting when he "** * * was still in debt a certain amount of money to Paramount* and any amount of money I gave him (i.e. Hilts, Treasurer) was to *apply on the debt.*" (310) (Emphasis ours).

Mr. Brewer had Exhibit 36 for months before the trial and never objected to any item therein at any time.

If, as Mr. Brewer testifies, Paramount owed him \$1,305.97 (462), then the balance of the debt remaining in favor of Paramount is the sum of \$1,794.03. But there is no evidence to support Mr. Brewer's claim.

His charge that Paramount owed him \$1,305.97 shows on the record to be based on an audit prepared by him and offered in evidence in the last *seconds* of the trial (460-466). This accounting and its offer were in such violation of court procedure and fair practice that it was rejected by the Court (466). Mr. Brewer never excepted to or appealed from the Court's rule. His claim that Paramount owed him is without legal support for two reasons:

(1) Respecting the account he says: "** * * I will concede there may be a mistake someplace * * *.*" (460); and

(2) The accounting was not allowed in evidence by the Court (466).

Mr. Brewer cannot ask the appellate court to accept

as correct that which he himself doubted and the trial court excluded without his protest.

The appellate court's statement that Paramount's monetary claims are "* * * secondary or collateral issues * * *" (Opinion, pp. 4, 5) must be confined as and for its own conclusions. Such is not the attitude of appellant. These monetary claims were an integral part of all its proceedings, commencing with the complaint (21), covered by exhibits, both original and prepared and introduced at pre-trial for Mr. Brewer to tear apart (with negligible results) (120-121) and covered by testimony (see citations in this Petition) and presented in every argument in every brief (First Appeal, Opening Brief, p. 32, Reply Brief, p. 4; Second Appeal, Opening Brief, p. 26, Reply Brief, p. 5). Mr. Brewer's strategic omission of argument in his briefs does not classify them for Paramount as "secondary." These claims would have been the subject of law action, but for the fact they could be combined with very much desired equitable relief. You do not love the second child less because the older was born first. Part payment of a debt in itself may not be conclusive, but part payment under the circumstances of this case gives rise to at least the following general principle of law:

"Part payment of a debt does not bar a claim for the balance, but, it has been held, raises in law an implied promise to pay the balance."

48 C.J., §68, p. 631.

30 Cyc., "Payment," p. 1220:

"As a general rule, part payment of a debt raises in law an implied promise to pay the balance."

In the decision in *County Trust Co. of Md. v. Stevenson*, (1936) (Md.) 185 A. 435, the court applied this principle of law, and said the fact that since interest on the debt evidenced by the note, had been paid from time to time "this would certainly amount to a recognition that the original obligation was an outstanding and subsisting liability."

In *Morris v. U. S. Equitable Life Assurance Society*, (1922) 109 Neb. 348, 191 N.W. 190, an action was brought on a life insurance policy, the insurance company had previously made a payment of \$310.00 to plaintiff. In affirming the judgment for plaintiff, the court said:

"It appears of record that defendant made a part payment of the insurance and that it paid \$310.00 on the same. We understand this to be admitted by the appellee and there is no controversy about the fact. After deducting this payment from the face of the policy there is found the difference between this item of \$310.00 and the face of the policy or \$2,190.00.

"As a general rule of law it is true that part payment of a debt raises a presumption that there is a promise to pay the balance."

Liability cannot be defeated by a "glance" and a wave of disapproval by Mr. Brewer even if his testimony to that effect were true (309).

Paramount respectfully urges that part payment of an admitted debt, without evidence of non-liability or of a counterclaim, justifies the Court in directing a judgment in favor of Paramount for \$3,100.00.

(NOTE: This statement bears only on prospective court procedure and not on the merits of this particular point: If the Court feels justice requires an opportunity for Mr. Brewer to now present his accounting, Paramount would willingly comply with such direction for further testimony if allowed an opportunity to analyze Mr. Brewer's accounting in the manner provided for in pre-trial.)

II. Appellee Brewer Owes \$478.15 to Paramount for the July 1947 Business.

Is Mr. Brewer to take over Paramount's Oregon business for the month of July, 1947, including all proceeds therefrom, and pay nothing? This is the result of the Courts' decisions and of course agreeable to Mr. Brewer, but not in accordance with the evidence of either party.

Exhibit 39 proves Mr. Brewer owed Paramount \$478.15 for payment on the franchise for July, 1947 (373). This accounting was taken from Mr. Brewer's books in the Portland, Oregon office (373) and the amount is unpaid (374). For the month of July, Mr. Brewer collected all accounts receivable, deposited them in the bank and when he left, drew out the money and put it in his pocket (236-7).

APPELLANT'S CASE: Paramount's corroborated testimony is that Mr. Brewer went back on the original franchise after June 30, 1947 (161, 231, 237-8, 261). His compensation was then fixed by agreement (31).

APPELLEES' CASE: Mr. Brewer admits he was told he would go back on the original franchise as of July 1,

1947. (284) and admits he agreed he “* * * would carry on the business for the month of July * * *” (285, 315, 318, 452, 500). The reason appellee “resigned” was because Paramount did not live up to its 50/50 split of profits, but put him back on the 20/80 division. This was the entire and only reason he quit (306, 473-4). The trial court finds Paramount’s repudiation justified Mr. Brewer in terminating his relationship (Finding VI, Tr. 546).

Consequently, based on the Court’s findings in support of Mr. Brewer’s claims, the following conclusions are compulsory:

By Paramount’s repudiating the Modification Agreement (Finding VI, Tr. 546) under which Mr. Brewer was working (Finding V, p. 546), Mr. Brewer was forced back on the original franchise (284) under which he admits he was carrying on the business for July, 1947 (315, 285, 318, 452). Otherwise, there was no evidence of rescission to support Mr. Brewer’s claim or the Court’s finding. It then follows, as night the day, that Mr. Brewer owed Paramount something out of the business for July, 1947, and Exhibit 39 proves the exact amount that Mr. Brewer owed. There is not one word in the entire record or appellees’ briefs that disputes this amount or Paramount’s claim.

III. Appellee Brewer Owes \$973.30 to Paramount for Fixed Assets Taken by Him from Paramount.

APPELLANT’S CASE: Mr. Brewer, in his franchise agreement of July 1, 1946, agreed on termination of the

franchise to surrender these assets (par. 20, Tr. 36). The second half of Exhibit 50 is a list of the fixed assets, consisting of equipment stated at their book value, less depreciation (374-5), not returned by Mr. Brewer.

APPELLEES' CASE: There is no direct reference to this exhibit or its contents or testimony against the exhibit in appellees' case. Appellee relies on generalities for his defeasance. Without detail, Mr. Brewer states he turned over everything except a spray trailer and a fog machine (507). He could not find the spray machine (286). He told them he would bring it down (287), but doesn't say he ever did, and then in a perfectly inconsistent position, he says they could have these things if they paid for them (529).

Exhibit 50 (second part) is specific in its charges and taken from the records. These statements Mr. Brewer cannot and does not deny. If the proof offered by Mr. Brewer does not meet these charges, then Mr. Brewer must take the responsibility for failure to make his defense specific and adequate. There was better evidence than his oral statements to prove delivery and where inferior evidence is offered, where better proof is available, there is a presumption that the better evidence would be adverse to his claims (1 *O.C.L.A.* §2-407 (6)) and that presumption is invoked here.

Appellant knows of no way to require the Court to believe Mr. Hilts' or Paramount's evidence in preference to the testimony of Mr. Brewer on these matters in issue, but appellant does call attention to the fact that Mr. Hilts was never impeached, but Mr. Brewer was

impeached by the record itself on several occasions (see Appellant's Opening Brief, pp. 24-25), and the Oregon statute says that the testimony of a witness so impeached is to be viewed with distrust (*O.C.L.A.* §2-1001 (3)).

IV. Mr. Brewer Owes Paramount \$925.89 for Unsupported Expenditures.

APPELLANT'S CASE: Exhibit 51 is a list of checks showing that they were drawn and paid out of the Portland account of appellant and appellee. There is no documentary evidence to support these checks or justify their expenditure, and in accordance with good accounting practice Mr. Brewer is charged with the moneys that he withdrew for unidentified purposes, as he is in the best, and in this case the only position to know where the money actually went (375).

APPELLEES' CASE: Mr. Brewer admits these checks were drawn to him personally which identifies his liability, but with characteristic generality, he says they all went into the business and the book shows what they were for (457-8). Appellant submits that Mr. Brewer and he alone can state whether those moneys went for the purposes of the business, and in good faith, from his fiduciary capacity, he should give the Court an abiding conviction that they were honestly expended, or else suffer the consequences of his generalities. His testimony in this case does not merit the confidence that he asks the Court to bestow upon it.

Again, appellant invokes the legal presumption in 1 O.C.L.A. §2-407 (6) to the following effect: Appellant says the books do not disclose the purposes for which these checks were used. Mr. Brewer claims by *oral* testimony that the books do show the purposes of these checks. There are two answers to this: (1) How could they show any business purposes if, as he testifies, the checks were drawn to him personally, and (2) under the presumption last cited, if the books do show it, he should introduce the superior evidence rather than rely on his inferior oral testimony.

IN CONCLUSION, it is submitted that Exhibits 36, 39, 50 and 51, with the supporting evidence before the Court, show that Mr. Brewer owes these sums to Paramount. These sums are *not for damages*. They are based solely on contract. We ask the Clerk of the Court to place these exhibits before the Court, together with this Petition for Rehearing. We urge the Court to consider all the evidence in support of and the lack of evidence in defense of these claims.

Respectfully submitted,

KENNETH C. GILLIS

and

ROBERT R. RANKIN,

Attorneys for Appellant.

CERTIFICATE

I, KENNETH C. GILLIS, and I, ROBERT R. RANKIN, attorneys for Paramount Pest Control Service, appellant and petitioner herein, as its counsel, certify that in our individual and collective judgment this Petition is well founded and that it is not interposed for delay, but solely upon the deep conviction of its merits.

Dated this 16th day of November, 1949.

KENNETH C. GILLIS

and

ROBERT R. RANKIN,

Attorneys for Appellant.



